Supreme Court, U.S.
FILED

(1) 96 248 AUG 14 1996

No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

MRS. SAMUEL E. ALLGOOD, INDIVIDUALLY AND AS INDEPENDENT EXECUTRIX OF THE ESTATE OF SAMUEL E. ALLGOOD, MARCUS ALLGOOD and MALCOLM ALLGOOD,

Petitioners,

vs.

R.J. REYNOLDS TOBACCO COMPANY, THE AMERICAN TOBACCO COMPANY, THE TOBACCO INSTITUTE, INC. and THE COUNCIL FOR TOBACCO RESEARCH-U.S.A., INC.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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86 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals erred in affirming the District Court's granting Respondents' motions for summary judgment and dismissing the case, and in denying Plaintiffs' motion for new trial.

2. Whether the Court of Appeals erred in affirming the District Court's denying Plaintiffs' motion to compel production for in camera review of the "lawyer's special projects" documents.[1]

3. Whether the Court of Appeals erred in affirming the District Court's granting R.J. Reynolds' motion for protective order, which required Plaintiffs to return two discovered "Camels Medical Relations Division" documents.[2]

[1, 2] Petitioners are not addressing these two discovery questions in this petition for certiorari, since if Petitioners cannot prevail on the summary judgment question, then these two questions would be moot. Petitioners will address these two questions in their Brief.

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*** Citation appears in footnote.**

PETITION FOR CERTIORARI

OPINIONS BELOW IN THIS CASE

Unpublished Amended Memorandum and Recommendation on Defendants' Motions for Summary Judgment (App. 15a-42a) in *Allgood v. R.J. Reynolds Tobacco Co,* (U.S. District Court, Southern District of Texas, Houston Division, C.A. No. H-91-0518, U.S. Magistrate Judge, adopted), and *Allgood v. R.J. Reynolds Tobacco Co.*, 80 F.3d 168 (5th Cir. 1996) (App. 2a-9a).

JURISDICTIONAL STATEMENT

This petition for certiorari relies on 28 U.S.C. §1254 to seek review of the Fifth Circuit Court of Appeals' Opinion, filed April 16, 1996 (App. 2a-9a). Petition for rehearing was denied May 16, 1996. (App. 1a)

STATUTORY PROVISIONS

This case involves Rules 6(d), 8(c), and 56(c), (e), of the Federal Rules of Civil Procedure; Rule 801(d)(2)(A), (C), and (D) of the Federal Rules of Civil Evidence; and Texas Business and Commerce Code §§2.103(a)[4], and 2.725(b). Copies of these provisions are included in the attached Appendix at pp. 43a-45a.

STATEMENT OF THE CASE

The court of first instance, the U.S. District Court, had jurisdiction pursuant to 28 U.S.C. §1332(a). In this Petition, the Respondents are called RJR, AT, TI, and CTR.

I. Statement of Facts

There are extensive facts of record and the page limitation does not permit repeating them. The relevant record facts are discussed fully with the respective points of law in the

Argument. Following is a skeletal chronology, insofar as the summary judgment record permits:

12/1/29	Samuel Edward Allgood born to Myron and Georgia Mae, who divorce. (R.3744, 3692)
8/1/37	Myron and Lillian Gibson marry, (R.319, 3692), and Allgood lives with them. (R.4107, 4104) Myron smokes, Lillian doesn't. (R.4893, 4892)
12/1/37	Allgood is smoking daily, Bull Durham (AT) and Prince Albert (RJR). (R.4899-4896)
12/41	Myron and Allgood have switched to Camels non-filter. (R.4893, 3371-3369)
9/47	Allgood quits school, joins the Navy. (R.4097)
1949	Allgood is smoking 1-1/2 packs/day, and is addicted to nicotine. (R.4961-4960, 3829) Hereafter his smoking is, primarily because of his nicotine addiction, involuntary, until in 1987 he gets life-threatening larynx cancer. (R.3828)
7/53	Allgood is smoking Pall Malls. (R.3742, 4316)
12/14-18/53	The "Big Six," including AT and RJR, and other tobacco companies, form the Tobacco Industry Research Committee. (R.3989-3984)
1/4/54	The TIRC publishes "A Frank Statement to Cigarette Smokers." (R.3590-3579)
12/1/56	Allgood marries Bonnie Reeve. (R.4865)
2/4/58	The Tobacco Institute is formed. (R.3898)
5/4/67	Allgood discharged from active duty Navy as a Chief Petty Officer, Gunnery. (R.4092)
1970	Allgood starts at Amoco Chemical Company in Texas City, Texas, as a Lab Tech. (R.849-848)

2/20/85	Respondents assert, and Petitioners dispute, that the Amoco plant doctor, Kenamore, first told Allgood on an annual exam that he had emphysema caused by smoking. (R.5035, 5439-5431)
2/17/87	Allgood told by his family doctor, Dr. Burton Hink, that he has laryngeal cancer, and Allgood stops smoking. (R.3355-3354, 3387, 392)
----	Allgood has neck cancer surgery. (R.3795)
----	Stomal recurrence of neck cancer. (R.3795)
1/23/89	Allgood dies of hemorrhage which the attending physician states is due to neck cancer. (R.3744)

II. Procedural Background

On January 4, 1991, Bonnie, Marcus, and Malcolm Allgood filed this suit against RJR, AT, TI, and CTR, in state court in Houston, Texas. The petition alleged fraud, fraudulent concealment, misrepresentation, negligence, breach of express and implied warranties, strict liability (marketing defect), strict liability (design defect), civil conspiracy, gross negligence, and malice, and statutory deceptive trade practice (later dropped), and prayed for compensatory survival and wrongful death, and punitive, damages. Respondents removed the case to the U.S. District Court for the Southern District of Texas, Houston Division, and answered asserting denials and affirmative defenses.

From November 2, 1993, to April, 1994, Respondents filed summary judgment motions and Petitioners responded. On April 12, 1994, Judge David Hittner heard all summary judgment motions. On July 28, 1994, the motions were heard by Magistrate Judge Maryrose Milloy. On November 7, 1994, Judge Milloy issued her Amended Memorandum and Recommendation (App. 15a), that Defendants' motions be granted. Petitioners timely filed objections. On April 3, 1995, District Judge Vanessa Gilmore adopted Judge Milloy's recommendations (App. 13a), and entered Final Judgment

dismissing the case (App. 12a). On April 17, 1995, Petitioners filed a motion for new trial, and Respondents filed Bills of Cost totaling $78,616.06, which Petitioners opposed. On June 13, 1995, Judge Gilmore denied the motion for new trial (App. 10a) and disallowed all Bills of Cost (App. 11a).

Petitioners appealed. On April 16, 1996, the Court of Appeals affirmed (App. 2a), holding that: two-year limitations barred negligence, conspiracy, and "product liability" claims; warranty claims were barred as to TI and CTR, held not to be "sellers" of cigarettes, and as to RJR and AT on four-year limitations including that any express warranties don't "explicitly extend to future performance;" post-1969 fraudulent concealment claims are preempted under *Cipollone v. Liggett Group*, 505 U.S. 504 (1992); fraud claims fail for no proof of reliance; and *Joseph E. Seagram & Sons v. McGuire*, 814 S.W.2d 385 (Tex. 1991) barred duty to warn claims. Petitioners filed a petition for rehearing on April 30, 1996, and it was denied on May 16, 1996 (App. 1a).

III. Reasons For Granting The Petition

This case merits the Court's review because the Court of Appeals: (1) has decided important federal questions in ways that conflict with relevant decisions of this Court: whether to review the record and draw all inferences in the light most favorable to the non-moving party, in ways throughout its Opinion that conflict with this Court's decision in *U.S. v. Diebold, Inc.*, 369 U.S. 654, 655 (1962 per curiam); whether an ex parte deposition of non-movant's decedent is proper summary judgment evidence, in a way that conflicts with this Court's decision in *Celotex v. Catrett*, 477 U.S. 317, 320, 324 (1986); and, whether a post-1969 fraudulent concealment claim is preempted by the Cigarette Labeling Act, in a way that conflicts with this Court's decision in *Cipollone*, 505 U.S. at 528; (2) has decided an important question of federal procedure, whether an affidavit in support of a motion for summary judgment which is filed the day before the hearing

can be considered, in a way that conflicts with Federal Rules of Civil Procedure 6(d), and with a decision of the First Circuit Court of Appeals; (3) has departed from accepted and usual course of summary judgment procedures, in conflict with the Court of Appeals' own opinions holding that nonmovants' experts' testimonies cannot be disregarded on summary judgment, and that inconsistencies in relevant deposition testimony creates genuine issues of fact, and by violating its F. R. Civ. P. 56(c) duty to decide the motions "as a matter of law," including to form its opinions of law correctly, as to call for an exercise of this Court's power of supervision; and, (4) throughout its Opinion, is in conflict with various decisions of other United States courts of appeals, and with decisions of the Texas Supreme Court.

If the Court of Appeals' Opinion stands, then none of over 400,000 Americans who are killed yearly by tobacco use (R.5001), could ever find justice. The rights the Court recognized in *Cipollone* would be for naught. The Court can use this case to supervise lower courts on several crucial aspects of summary judgment procedure in tobacco cases.

IV. Argument

A. Statute of Limitations

1. Two-year: negligence, conspiracy and "product liability claims" (App. 3a-4a)

a. Kenamore affidavit untimely filed

The crucial Dr. Kenamore affidavit was filed with RJR's and AT's reply the day before the April 12, 1994 hearing, not with their motion as required by F. R. Civ. P. 6(d). (R.4580, 5101) Rule 6(d) applies to Rule 56 motions. 10A Wright, Miller & Kane, *Federal Practice and Procedure* §2719, p. 5. Respondents didn't obtain leave of court for this untimely filing. The Kenamore affidavit cannot be considered

as summary judgment evidence. *Cia Petrolera Caribe, Inc. v. Arco Caribbean, Inc.*, 754 F.2d 404, 409 (1st Cir. 1985).

b. "*Mere allegations* that Dr. Kenamore may have been mistaken, *without supporting evidence...* "

Here the Court of Appeals failed to consider two independent sources of genuine issues of material fact.

(1) The Court of Appeals ignored Allgood's ex parte deposition testimony[3] as an affidavit and proper summary judgment evidence. Given after he last saw Dr. Kenamore (R.5124, 5120, 5118, 5117-5116, 5114-5112), it creates a genuine issue with Dr. Kenamore's purported testimony that he told Allgood he *had* emphysema due to smoking.

(a) This Court, in *Celotex*, 477 U.S. at 320, 324, in including in summary judgment proof the decedent's deposition supporting non-movant, stated that non-movant is not required "to produce evidence in a form that would be admissible at trial in order to avoid summary judgment." This Court must have relied on the deposition, otherwise the order would have been "reversed and rendered" for the defendants, not "reversed, and the case is remanded for further proceedings ... ." *Id.*, 328. Presumably this Court did not rely on the two letters since they are not among the documents listed in Rule 56(c). *Id.*, 324. The defendants must not have been present at the deposition, since they objected to it as

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3 Q: Has any doctor ever told you to quit smoking?
A: Yes, sir.
Q: Who would that be?
A: Dr. Kenamore, the plant doctor.
Q: Kenamore?
A: Kenamore, K-e-n-a-m-o-r-e.
Q: He tell you why you should quit smoking?
A: Well, shortness of breath, he says. He said if I didn't, *I'd probably wind up with emphysema or something*. (emphasis supplied)

hearsay. *Id.*, 320. The deposition testimony must have "set forth such facts as would be admissible in evidence," Rule 56(e), i.e., non-prejudicial facts within personal knowledge. So does Allgood's deposition testimony.

(b) 8 Wright & Miller, *Federal Practice and Procedure*, §2142, p. 452, states:

> A deposition is at least as good as an affidavit and should be usable when ever an affidavit would be permissible, even though the conditions of the rule on use of a deposition at trial are not satisfied. *

> * ... "The depositions were taken under oath and we hold that they are at least as good as affidavits on the hearing for a motion for preliminary injunction." U.S. v. Fox, D.C. La. 1962, 211 F. Supp. 25, 30, affirmed CA 5th, 1964, 334 F.2d 449, 454.

This principle is widely followed: *Diamond Plus, Inc. v. Kolber*, 960 F.2d 765, 767-68 (8th Cir. 1992); *RSBI Aero., Inc. v. Affiliated FM Ins. Co.*, 49 F.3d 399, 403-04 (8th Cir. 1995); *Hoover v. Switlik Parachute Co.*, 663 F.2d 964, 966-67 (9th Cir. 1981); *Curnow v. Ridgecrest Police*, 952 F.2d 321, 323-24 (9th Cir. 1991); *Peterson v. Instapak Corp.*, 690 F. Supp. 697, 700 n.4 (N.D. Ill. 1988); *Microsoft v. Very Competitive Computer Products*, 671 F. Supp. 1250, 1254 n.2 (N.D. Cal. 1987); *Illinois Migrant Council v. Pilliod*, 398 F. Supp. 882, 886 n.4 (N.D. Ill. 1975); *Tormo v. Yormark*, 358 F. Supp. 1159, 1168-69 (D.N.J. 1975); *In Re Baker & Getty Financial Services, Inc.*, 98 B.R. 300, 304-05 (Bkrtcy N.D. Ohio 1989); *In Re Robert Landay Associates, Inc.*, 56 B.R. 648, 651 (Bkrtcy S.D.N.Y. 1986); *Matter of Melton*, 39

B.R. 762, 763-64 (N.D. Ga. 1984); *Stinnett v. Longi, Inc.*, 460 So.2d 528, 530-31 (Fla. App. 1984).

(2) Comparing Dr. Kenamore's affidavit to its attached records, in a light most favorable to Allgood, they make out a genuine issue of material fact whether Dr. Kenamore ever told Allgood that he had emphysema due to his smoking.

(a) In his April 7, 1994 affidavit, Dr. Kenamore, who had been a plant doctor for Amoco Chemical in Texas City, Texas, naturally relied on the Amoco medical records he attached for two annual employee examinations he did on Allgood eight years before, his only contacts with Allgood (R.5037-5025). Dr. Kenamore begins each discussion of his interactions with Allgood with, "4. According to Amoco medical records bearing my signature and initials, attached as Exhibit 1, ..." and "5. According to additional Amoco medical records bearing my signature, attached as Exhibit 2, ..." (R.5036) Everything following in paragraphs 4 and 5 is subject to this reference to the records. (R.5036-5035) This supports a reasonable inference that Dr. Kenamore, on April 7, 1994, had no memory of his two interactions with Allgood eight years before, but was relying entirely on the Amoco records. The only hearsay exception arguably applicable for the attached records is recorded recollection, which requires that the declarant have no current recollection of the events. F.R. Civ. E. 803(5). Dr. Kenamore's affidavit is not "made on personal knowledge," F. R. Civ. P. 56(e), except as presenting the attached records as his own recorded recollection, and that extends only to his personal entries on those records.

(b) In particular, Dr. Kenamore's statements in his affidavit, in paragraph 4, that he "informed Mr. Allgood of my diagnosis," and, in paragraph 5, that he "confirmed my prior diagnosis of emphysema and, ... again (sic) explained to Mr. Allgood that his pulmonary condition was related to his smoking ..." (R.5036, 5035), are nowhere stated by Dr. Kenamore in the attached records, (R.5034-5025), especially

when they are read in a light most favorably to Allgood. Dr. Kenamore, on the February 20, 1986 record, put his check mark by "Chest – No significant abnormality (includes to percussion and auscultation)." (R.5026) Dr. Kenamore also wrote there, "Has emphysema. Advised to stop smoking again." It is a reasonable inference from this record that Dr. Kenamore *only* advised Allgood to stop smoking, because any emphysema was incipient and not significant at this time, and that any emphysema in 1985 was also insignificant. On the other hand, the work restrictions Dr. Kenamore entered on January 10, 1985, were very significant: "Remarks: No pushing or pulling; No stooping, crouching, or bending; Not to lift over 25 pounds; No vertical ladder; No fire fighting; Must wear noise protection on job." (R.5031) Dr. Kenamore did not include anything about emphysema under "Remarks." It is a reasonable inference that Dr. Kenamore's *initialing* in 1985 by the *typed* "Discussed results with employee" (R.5033), where "results" aren't specified, meant that only the very significant "Remarks" items were discussed with Allgood. There is no similar entry for 1986.

c. The continuing tort doctrine: "Texas has limited its application to cases where the causal relation between action and injury remained unknown to the plaintiff."

(1) The concept of continuing tort tolls any statute of limitations until February 17, 1989, when Allgood learned he had laryngeal cancer and stopped smoking (R.3387, 392). *Adler v. Beverly Hills Hospital*, 594 S.W.2d 153, 155 (Tex. Civ. App.–Dallas 1980, no writ) (limitations for false imprisonment tolled until detention ended). The concept has also been applied in a nicotine addiction case, *Castano v. The American Tobacco Co.*, 870 F. Supp. 1425, 1430-31 (E.D.La. 1994), *rev'd on other grounds*, 84 F.3d 734 (Louisiana law, same as Texas'), in a Halcion addiction case, *Upjohn Co. v. Freeman*, 885 S.W.2d 538, 542-44 (Tex. App.–Dallas 1994, DENIED), in a negligent infliction of emotional distress case,

Twyman v. Twyman, 790 S.W.2d 819, 821 (Tex. App.–Austin, 1990), reversed and remanded for new trial on other grounds, 855 S.W.2d 619 (Tex. 1993); in a continuing spousal abuse case, *Franzetti v. Franzetti*, 120 S.W.2d 123, 126 (Tex. Civ. App.–Austin 1938, no writ); in a continuing trespass case, *Creswell Ranch & Cattle Co. v. Scroggins*, 39 S.W. 612, 614 (Tex. Civ. App. 1897, no writ); and to "failure to provide needed and requested medical attention" case. *Lavellee v. Listi*, 611 F.2d 1129, 1132 (5th Cir. 1980).

Respondents' continuing tortious conduct caused Allgood to continue to smoke until he got larynx cancer:[4] RJR's and AT's advertising was a substantially contributing factor in young Allgood's pre-1949 continuing to smoke. *Infra*, 21-22. RJR and AT negligently failed to warn Allgood by 1942, which if done suitably, likely would have made him stop. (R.4889-4888, 4886-4885, 4881-4879) Unreasonably dangerous cigarettes (R.3826-3746) addicted Allgood by 1949 (R.4961, 4960, 3829), which then was the primary determinant deterring him from smoking cessation (R.3828), and the "Frank Statement," the TI/CTR "its not proven" message, and AT and RJR "smoking is healthy" advertising, were substantially contributing factors in that deterrence, *infra*, 21-30, and as a result health risk warnings were not effective to deter him (R.3828). Allgood's smoking caused his laryngeal cancer that killed him (R.3795-3794)

(2) The Court of Appeals misstated Texas law in holding that the concept was limited "to cases where the causal relation between action and injury remained unknown to the

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4 Petitioners' medical and epidemiological expert, Dr. Remington, states:

> As in the case of any smoker who gets a smoking-caused disease, every cigarette which the smoker smoked from the time that the smoker began smoking regularly contributes to the smoking-caused disease. (R.4111)

plaintiff." (App. 4a) Applying the concept in *Twyman* to continuing spousal abuse, *Adler*, to wrongful imprisonment, *Scroggins*, to continuing trespass, and *Franzetti*, to continuing spousal abuse, all plaintiffs necessarily knew of the continuing injury and its continuing cause, yet the continuing tort concept was applied. It's the defendant's continuing tortious conduct, not the plaintiff's knowledge, that matters.

(3) The Court of Appeals further misstated Texas law in basing its declaration of Texas law on an erroneous statement from *Freeman*: "If Freeman had discovered his injury and its cause, the rationale for the continuing-tort rule would no longer apply, and the statute would commence to run at that point." 885 S.W.2d at 544. *Freeman* relied entirely on *Adler* in holding that continuing tort applied to Freeman's addiction, 885 S.W.2d at 542-43, and as to "the rationale for the continuing tort rule," *Adler* stated, "We regard the entire period of detention as one continuing tort, for which a cause of action accrues when the detention ceases." 594 S.W.2d at 155-56. This, regardless that Adler knew of his injury and its cause from the moment he was detained.[5]

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[5] Furthermore, the three citations to *Freeman*'s erroneous statement do not support it. *Atha v. Polsky*, 667 S.W.2d 307, 310 n.3 (Tex. App.--Austin 1984, writ ref'd n.r.e.), quotes Perdue, *The Law of Texas Medical Malpractice: Limitations*, 11 HOUS. L. REV. 825, 834 (1974), concerning the continuous *treatment* doctrine, the alternative limitations provision of now-repealed Tex. Ins. Code Ann. art 5.82 §4 ("... or from the date the medical treatment that is the subject of the claim ... is completed"). *Atha* held only that this provision cannot be extended to toll the statute for as long as the general physical-patient relation continued. 667 S.W.2d at 310-11. Neither *Atha* nor Perdue discusses the continuing *tort* doctrine. As cited by *Freeman*, *Atha* states that the continuous *treatment* doctrine does not apply "where the patient, prior to termination of the treatment, discovers, or has an opportunity to discover, *the act of malpractice* and his injury ...' " (emphasis supplied) 667 S.W.2d 310 n.3. Thus, *Atha* was speaking of a single, distinct act of malpractice, not a continuing wrong. Similarly, *Tectonic Realty v. CNA Lloyd's of Texas*, 812 S.W.2d 647, 653 (Tex. App.--Dallas 1991, writ denied), only applied the usual limitations rule, that the action accrues when TRICO learned of CNA's unreasonable failure to pay under the policy, and is not a continuing tort case.

(4) *Freeman* affirmatively supports Petitioners' application of the continuing tort theory: "the evidence adduced at trial supports Freeman's ignorance of Halcion's efforts on him." 885 S.W.2d at 544. Similarly, Allgood always said to his wife, Bonnie, "Nothing is going to happen to *me*." (R.5106) As the Court of Appeals recognized, (App. 7a):

> Indeed plaintiffs' own expert testified that Allgood would have continued smoking absent an immediate and personal life threatening situation. In addition, his wife's deposition admitted that he was so addicted that no amount of warning could induce him to quit.

Even assuming Dr. Kenamore told Allgood that he had emphysema caused by his smoking, that was not an immediate life-threatening disease, and the chain of Defendants' tortious conduct toward him, *supra*, 10, continued unbroken until February 17, 1987, when Allgood's claims accrued. He died on January 23, 1989 (R.3744), rendering Petitioners' derivative claims not barred under *Russell v. Ingersoll-Rand Co.*, 841 S.W.2d 343, 345 (Tex. 1992).

2. Breach of Warranty Claims (App. 4a-6a)

a. Respondents CTR and TI: "Seller"

Tex. B. & C. Code §2.103(a)(4) provides the only Code definition of "seller:" "'Seller' means a person who sells or contracts to sell." The Texas Supreme Court refers to a dictionary when necessary to define a statutory term, e.g., "explicit" in Tex. B. & C. Code §2.725(b), *Safeway Stores, Inc. v. Certainteed Corp.*, 710 S.W.2d 544, 547 (1986).

> *Webster's Seventh New Collegiate Dictionary* (1971)'s definitions of "sell" include:
>
> **5a:** to develop a belief in the truth, value, or desirability of

> **b:** to persuade or influence to a course of action or to the acceptance of something (~ children on reading)

There are genuine issues whether CTR and TI were "selling" cigarettes– "to develop [in smokers] a belief in the [tobacco industry's] truth," that it's not proven that cigarettes cause disease, and, "to persuade or influence [smokers] to the acceptance of" cigarettes.

As to CTR and its predecessor, the TIRC:

(1) TIRC's initial goal, formulated in December 1953, was to reassure the public in view of the reports that cigarette smoking was in some way linked with lung cancer in human beings; and in the long run, TIRC's principals' objectives were to "sponsor a public relations campaign which is positive in nature and is entirely 'pro-cigarettes,'" and to "promot[e] cigarettes and [protect] them from these and other attacks that may be expected in the future." (R.3981)

(2) TIRC's "Frank Statement" stated on January 4, 1954 in 448 major U.S. newspapers (R.3932), that AT, RJR and the other sponsors "accept an interest in people's health as a basic responsibility, paramount to every other consideration in our business," and, "In addition there will be an Advisory Board of scientists disinterested in the cigarette industry." (R.3529-3528) Prof. Pollay shows the fraud in these statements from tobacco industry documents. (R.4024-4019)

(3) Evidence of CTR's value to the tobacco industry is in the notes of a meeting at R.3859-3858 (Exhibit T). Prof. Pollay, referring to these notes, states (R.4014):

> Evidence as to the value to the tobacco industry of all of CTR's activities ... is in the document attached as Exhibit T .... Exhibit T is handwritten notes of a "CTR Meeting–Yeaman, Gardner, Hockett, Stevens, Judge:" Addison Yeaman,

> Brown & Williamson; Gardner and Hockett, CTR Scientific Director and Associate Scientific Director; and Arthur J. Stevens and Curtis H. Judge, Lorillard. This testimonial is recorded:
>
> > CTR is the best and cheapest insurance the tobacco industry can buy and without it the Industry would have to invent CTR or would be dead.
>
> Based on my studies of TIRC/CTR, I conclude that their forty years in business has constituted the largest and most sophisticated pubic relations effort that I have ever encountered.

(4) Prof. Pollay concludes: CTR's mission, to assure the public that cigarettes are safe despite reports linking them to disease, was a joint marketing effort to help sell cigarettes, and CTR was like a shared employee of the sponsoring tobacco companies in carrying out its mission. (R.4018-4017)

(5) The Court of Appeals referred to an affidavit stating that CTR doesn't sell cigarettes. (App. 5a) Against the above evidence, the affidavit at best creates a fact issue.

(6) *Inglis v. American Motors Corp.*, 197 N.E.2d 921 (Ohio App. 1964), aff'd, 209 N.E. 2d 583, is persuasive that CTR is a "seller." An automobile purchaser who relied on the mass media advertising of American Motors Corp. and its companion sales corporation as to the quality of American Motors' automobiles, and suffered damage due to latent defects, was held entitled to " bring an action against the manufacturer *and its companion sales corporation* for breach of express warranty albeit no privity exists between the parties." 197 N.E.2d at 927. (emphasis supplied)

(7) The Court of Appeals cited *Arceneaux v. Lykes Bros. Steamship Co.*, 890 S.W.2d 191 (Tex. App.–Beaumont 1994, writ filed): "Under Texas law only actual sellers are liable for

breach of warranty ..." (App. 3a). *Arceneaux* so stated only in dismissing the product designer whose design was copied without consent by the defendant, 890 S.W.2d at 196 n.2. The Court of Appeals also cited *Charles E. Beard, Inc. v. Cameronics Technology Corp., Ltd.*, 729 F. Supp. 528 (E.D.Tex. 1989), aff'd, 939 F.2d 280. (App. 5a) The defendant McDonnell Douglas ("M-D") had no relation to Cameronics, about whose products M-D made representations, other than that M-D, under a contract with the Australian Government, was providing information about Cameronics to U.S. companies. The court held that M-D was not a seller and made no warranties. McDonnell Douglas' relation to Cameronics, and the designer's to that defendant, were distant compared to CTR's relation to its organizers.

As to TI:

(1) TI made this admission on April 15, 1968 (R.973):

> Our basic position in the cigarette controversy is subject to the charge, and *may be subject to a finding*, that we are making false or misleading statements to promote the sale of cigarettes. (emphasis supplied)

This document is an April 15, 1968 memorandum from William Kloepfer, Jr., TI's Vice President-Public Relations, to Earle C. Clements, TI's President, with copies to Austern (of counsel to TI), Haas (of Liggett & Myers), Ramm (of RJR) and Yeaman (of Brown & Williamson). (R.969-968) This statement by TI's Vice President-Public Relations to its President is an admission by party-opponent under F. R. Civ. E. Rule 801(d)(2)(A), (C), and (D) as to the matters stated.

(2) The meaning of "our basic position in the cigarette controversy" in the above quote is "that the cigarette controversy is not a closed question" (R.971), as shown by Mr. Kloepfer's reference to "the industry's own position in the smoking and health controversy, as currently stated in our

draft 'position paper'." (R.972) This is confirmed by the April 16, 1968 draft of "The Cigarette Controversy–An examination of the facts by The Tobacco Institute" (R.956-932), the "Position Paper," (R.958-957), which discloses that TI's "basic position in the cigarette controversy" is that there is no conclusive proof that cigarettes are harmful. Furthermore, "subject to the charge, and may be subject to a finding" is the same as, there is a genuine issue of fact as to the truth of the charge. This admits that there is a genuine issue of fact whether TI, in saying that there is no conclusive proof that cigarettes are harmful, is making false or misleading statements to "promote the sale of cigarettes."

(3) Further to that issue is the TI Public Relations Program and Budget Proposal, prepared by Hill and Knowlton, Inc., and dated November, 1960 (R.930-907). This document confirms that it is a "basic objective of the Institute's program" to "reach increasing numbers of the public with the facts about tobacco and health, to refute the extreme charges against tobacco and to forestall or temper unwarranted attacks ... the public relations activities are closely coordinated with the scientific and information functions of the Tobacco Industry Research Committee" (R.929).

(4) TI's admission in the April 15, 1968 Kloepfer to Clements memo that TI "may be subject to a finding" that it is "promoting the sale of cigarettes," and the November, 1960 TI Public Relations Program, make plain that TI's mission is promotion of the tobacco industry's goal, which is to sell tobacco products. As with CTR, the Court should distinguish *Cameronics* and *Arceneaux*, apply *Inglis*, and conclude that there is a genuine issue whether TI is a "seller" of cigarettes liable for breach of warranty.

(5) The Court of Appeals referred to an affidavit stating that TI doesn't sell cigarettes. (App. 5a) Against the above evidence, the affidavit at best creates a fact issue.

b. Respondents RJR and AT: "explicitly extend to future performance."

(1) Young Allgood was smoking daily by 1937. (R.4899-4896) He routinely read *Life* from 1937 to 1947, having entered the Navy in September, 1947. (R.3691-3686, 3684-3682, 4092) RJR's advertisements for its *Camel* cigarettes in *Life* for 1937-1947 (R.4131-4124) made express warranties to Allgood that "explicitly extend to future performance," Tex. B. & C. Code §2.725(b), in the opinion of Prof. Pollay, whose expertise includes the impact of advertising on consumers (R.4025, 4134 (the ads are "explicit"), 4133):

> A representation that cigarettes won't hurt you, in my opinion, extends to future performance even if the smoker is only presently assured that his or her cigarettes are safe. I am informed that Mr. [Dr.] Patrick Remington, another of Petitioners' experts, has stated that Sam Allgood's throat cancer and death were caused by his long term smoking. I take this to mean that all of the cigarettes Sam Allgood ever smoked contributed to his disease, Therefore, a representation that the smoker's current brand of cigarettes "won't hurt you" extends to future performance–the smoker won't know whether that representation, or warranty, is true or not until the smoker either gets a smoking-caused disease or dies of something else. Furthermore, it is important to remember that the lay people to whom these ads are directed aren't doctors or scientists. They are going to react in the simplest terms.

Dr. Remington, Petitioners' medical and epidemiological expert, states that (R.4111):

> ... [E]very cigarette which the smoker smoked from the time that the smoker began smoking

> regularly contributes to the smoking-caused disease.

Dr. Grabowski, Petitioners' nicotine addiction expert, states in support of Prof. Pollay's reasoning (R.3829):

> [Regarding] drug dependent patients, e.g., users of cocaine, heroine, and nicotine. ... [I]t may well be that they believe themselves to be immune to risks because they themselves have not experienced the problems.

Cipollone, v. Liggett Group, Inc., 893 F.2d 541, 575, 576 (3rd Cir. 1990), *rev'd on other grounds*, 505 U.S. 504, rejecting Liggett's "transient effects only" contention, states:

> A reasonable jury could infer that an unqualified representation that smoking is safe creates a warranty that smoking for a long period of time is safe.

Prof. Pollay explains that the following advertising campaigns in *Life* warrant that *Camel* cigarettes won't harm the smoker's health, and so explicitly extend to future performance (R.4132-4123):

> 1946-47, "More Doctors Smoke Camels than Any Other Cigarette."
>
> 1937-47, ads featuring athletes and others in top physical condition.
>
> 1937-47, ads stating that Camels never make throats rough, later referring to the "T-Zone" and claiming that Camels are "easy on the throat."

(2) AT ads appeared in *Life* 1937-47 (R.4131-4124), and contained these health messages, in Prof. Pollay's opinion: "gentle on your throat," "throat protection against irritation" (1937-39); "authoritative tests" show "less nicotine" (1940). (R.4129-4128) While Allgood didn't buy AT's cigarettes

primarily then, he did buy cigarettes, and likely these health claims had effect on his buying any cigarettes, in Prof. Pollay's opinion. (R.4132) Such health claims are express warranties that explicitly extend to future performance. *Supra*, 17.

(3) AT conducted post-1954 advertising campaigns for Pall Malls, to which Allgood had switched (R.3742, 4316). Prof. Pollay testified that the 1950s Pall Malls ad campaign themes of "Guard against throat-scratch," with claims that the extra length of the Pall Malls filtered the smoke and made smoking them mild, *see* Pall Mall ads marked Exhibit D-3, at (R.4808-4787), were health claims, and that AT corporate documents recognized that the promised benefit of mildness promised satisfaction without penalty. (R.4785 -4778) Such health claims are express warranties that explicitly extend to future performance. *Supra*, 17.

(4) RJR and AT published "A Frank Statement to Cigarette Smokers" on January 4, 1954, (R.3529, 3528), which assured smokers that cigarettes were safe, with the assurance backed up by the sponsors saying they held the people's health paramount to every other consideration of their business. *Supra*, 13. Petitioners' experts' analysis, *supra*, 17, applies with even greater force to this "super ad," to show that these health claims were express warranties that explicitly extended to future performance.

(5) The *Safeway Stores v. Certainteed*, 710 S.W.2d 544, 546 (Tex. 1986) discussion of §2.725(b) is totally in the context of commercial transactions:

> The drafters' intentions were to establish a reasonable period of time, four years, beyond which *business persons* need not worry about stale warranty claims. *Standard Alliance Industries v. Black Clawson Co.*, 587 F.2d 813, 820 (6th Cir. 1978). The Code seeks "to make uniform the law among the various jurisdictions" to

> provide "needed relief for concerns *doing business* on a nationwide scale." (citations omitted) Adoption of a uniform date of accrual and rejection of the discovery rule in warranty cases is a permissible means adopted by the state legislatures to protect *commercial transactions*. ... It is clear that *a buyer and a seller can freely negotiate to extend liability into the future; that is why specific allowance was made for warranties "explicitly" extending to future perormance. Black Clawson Co.*, 587 F.2d at 820. ...

A date certain isn't appropriate in a tobacco tort case: "Here, there was no negotiation between Allgood and any of the Defendants." RJR, AT, TI Brief in the Court of Appeals, p. 16. Since a cigarette ad assurance of the lay smoker's health is taken as for the smoker's life, *supra*, 17, it would be anomalous if a warranty limited to a date certain permitted recovery, but one for the buyer's life didn't.

(6) Respondents filed no summary judgment evidence to rebut Prof. Pollay's, Dr. Remington's, or Dr. Grabowski's, opinions, *supra*, 17-18. The Court of Appeals ruled only that Petitioners should be held to the commercial case rule of a "specific date in the future," *see* para. (5), and that the opinion of a U.S. District Court in *Gunsalus v. Celotex Corp.*, 674 F. Supp. 1149, 1155 (E.D. Pa. 1987), was that AT's warranties don't extend to future performance. (App. 5a-6a) But the *Gunsalus* plaintiff had no expert opinion, 674 F. Supp. at 1154-55, and the Court of Appeals could not properly disregard the uncontradicted expert testimony offered by Petitioners. *Anthony v. Petroleum Helicopters, Inc.*, 693 F.2d 495, 497 (5th Cir. 1982) states:

> To arrive at this conclusion, the District Court must have disregarded the testimony of Linker and MBB's expert witnesses. As we have recently noted, it is not the province of the court on a

> motion for summary judgment to weigh the evidence, assess its probative value, or decide factual issues. Byrd v. Roadway Express, Inc., 687 F.2d 85, 86 (5th Cir. 1982).

Furthermore, *Gunsalus*, a 1987 Eastern District Pennsylvania case, was effectively overruled by the Third Circuit's 1990 ruling in *Cipollone* that advertising that cigarettes were safe so warranted for long term smoking. The Court of Appeals further improperly attempted to distinguish the Third Circuit's opinion in *Cipollone* by weighing the explicitness of the ads in *Cipollone* against Prof. Pollay's opinions on the RJR and AT ads, *supra*, in violation of *Anthony*, *supra*.

B. Claims for Fraudulent Misrepresentation and Concealment (App. 6a-7a).

1. Preemption.

Neither the Magistrate Judge, nor Respondents in their Briefs to the Court of Appeals, relied on this ground. Petitioners' duty to warn theories (negligence and strict liability/marketing defect) are expressly limited to before July 1, 1969 (R.2053), to comply with *Cipollone*, 505 U.S. at 524 and are not preempted. Petitioners' fraudulent concealment claim (R.2054) sets forth, like *Cipollone*'s, "intentional fraud and misrepresentation ... [by] conceal[ment of] a material fact," and is not preempted, *id.*, 528-29.

2. Reliance.

(a) Before his addiction to nicotine by 1949, (R.4961-4960, 3829), young Allgood left home and joined the Navy on September 3, 1947 (R.4092). He was smoking daily by 1937 (4899-4896). He routinely read *Life* from 1937 to 1947 (R.3691-3686, 3684-3682). *Life* during this period carried both RJR and AT ads (R.4131-4124). Probable reliance by young Allgood on these ads in continuing to smoke is made out by the testimony, as to any adolescent, of Adolescent Psychiatrist Dr. Daryl K. Knox:

> Tobacco industry advertising is and has been a substantial factor in causing an adolescent or a teenager who had experimented with smoking to continue smoking and become addicted to nicotine. (Assume advertising expert will establish that tobacco advertising has since the 1930s been to a substantial degree aimed at young people). (R.4822-4818)

Dr. Knox' assumption, that tobacco advertising has since the 1930's been to a substantial degree aimed at young people, is supplied by the testimony of Prof. Pollay: As to *Life* ads from 1937-47, "Many aspects of cigarette advertising made them of interest and appeal to a young audience: [aspects listed a. to f.]." (R.4131-4124).

(b) Petitioners' evidence that addicted Allgood read and relied on Respondents' (other than TI's) January 4, 1954 "Frank Statement to Cigarette Smokers" (R.3529, 3528):

(1) Allgood's U.S.S. Goldcrest shipmate Henry Brumfield states and substantiates in affidavit that on January 4, 1954, Allgood read "A Frank Statement to Cigarette Smokers" and believed it. (R.3742-3740) One of their officers, Wayne Haynie, testifies that he saw the "Frank Statement" in the *Miami Herald* on January 4, 1995, and that the Goldcrest crew were routinely provided both Miami papers in their rest area and had ample time to read them. (R.3736-3735) Both Miami papers, the *Herald* and the *Daily News*, ran the "Frank Statement." (R.3739-3738)

Charles Holleman, Allgood's shipmate, signed affidavits on July 26, 1993 and August 4, 1993, and affirmed these affidavits, that Allgood probably read the daily newspapers sold in Key West on January 4, 1954, at his October 18, 1993 deposition. (R.3660-3653) Whether this testimony, or his conflicting testimony elicited by Respondents (R.3323-3301), is true, raises the issue addressed in *Kennett-Murray Corp. v. Bone*, 622 F.2d 887, 894 (5th Cir. 1980):

> Thus, the alleged inconsistency created by the affidavit existed within the deposition itself. (footnote deleted) Accordingly, the issue concerning what Speights may have done and said to Bone was appropriately raised by the deposition even without consideration of the affidavit.

Furthermore, the additional conflict between Mr. Holleman's earlier affidavit and "Respondents' deposition pages" also creates genuine issues of material fact. 6 *Moore's Federal Practice*, Part 2, §56:15[4], p. 56-296 at n.48.

(2) Mr. Brumfield's deposition creates an independent ground of proof, more likely than not, that Allgood read and relied on the "Frank Statement" on January 4, 1954. Mr. Brumfield was a close friend of Allgood, and they spent a lot of time together. (R.3742) Allgood, while on the Goldcrest, read a lot, including the newspapers, and was informed about current events. (R.4318-4317) The Goldcrest crew had 30 minutes in the morning, and in the evening, to read the newspapers. (R.4305) From 7:30 to 8:00 a.m., the crew had free time, and everyone had their own routine during that time, including reading the paper. (R.4313-4312) Both the *Miami Herald* and the *Miami [Daily] News* were available on the Goldcrest (R.4309), and both ran the "Frank Statement." (R.4297, 4296) Allgood was in the mess hall during free time on the morning of January 4, 1954, when the "Frank Statement" was posted on the bulletin board in the mess hall. (R.4301-4300) There also was more than one newspaper in the mess hall that morning, (R.4368), which would be January 4, 1954 papers. (R.4306) From these facts it appears that Allgood had plentiful access to the "Frank Statement" on January 4, 1954, and that he probably read it. Also, *Mr. Brumfield saw Allgood read a newspaper every day he was with him on the Goldcrest.* (R.4305-4304) Since Allgood "just continued smoking" after reading the "Frank Statement" (R.4256), and probably (on the same basis) after reading two closely following anti-smoking articles (R.4268-4266), it is a

reasonable inference that he believed the "Frank Statement" as stated by Mr. Brumfield (R.3740).

(3) Petitioners' nicotine addiction expert, Dr. John Grabowski, provides another reliance link (R.3855-3854):

> ... I will assume, that Allgood saw or heard a message put out by The Council for Tobacco Research and its predecessor, that the proofs that smoking was harmful to health weren't conclusive, beginning with the attached "A Frank Statement to Cigarette Smokers;" and also that Allgood saw and believed the attached statement, and that he said about his smoking to others, that there were inconclusive proofs that it was harmful. Then it is my opinion that these messages were substantially contributing factors in deterring Allgood from attempting smoking cessation.

The first condition, that Allgood saw and believed the "Frank Statement," is satisfied by the testimonies *supra*, 22-24. The second, that Allgood said about his smoking to others, that there were inconclusive proofs that it was harmful, is satisfied by Respondents' deposition of Mr. John Crainer, Allgood's Amoco supervisor:

> Q. Can you tell the jury *just generally* what kind of opinions Allgood talked about in regard to him smoking?
>
> A. He just felt like that it was an activity that he liked *and that there was inconclusive proof* or immediacy was not pressing. (emphasis supplied) (R.3697)

(4) Another proof of Allgood's reliance: TIRC published the "Frank Statement" in 448 newspapers across the U.S., reaching an estimated 43,245,000 readers. (R.3932) It is astounding that, when it is claimed that a regular reader of two of those newspapers saw the "Frank Statement" and, being a

smoker, believed it, all as intended by TIRC (R.4019-4017), that CTR would now expend such great resources to raise all possible doubt that the particular smoker really saw and relied on it. Allgood very probably read the "Frank Statement," a very material statement. *Supra*, 22-24. Especially where, as here, there is a great lessening of ability to prove reliance because of the very long latency period of smoking-caused diseases (R.5000), it is appropriate to apply the rule that since a material fraudulent (R.4024-4019) representation[6] was made to Allgood, whose acts thereafter were consistent with reasonable reliance upon the representation (as TIRC intended, he kept on smoking), an inference of justifiable reliance arises. *Vasquez v. Superior Court of Appeals of San Joaquin County*, 484 P.2d 964, 972-73 (Sup. Ct. Cal. In Bank 1971) (large plaintiff class); *State v. First Nat'l Bank of Anchorage*, 660 P.2d 406, 422 n.26 (Sup. Ct. Alaska 1983) (*Vasquez* applied to ten persons.); *Brickyard Homeowners' Ass'n Mgmt. Comm. v. Gibbons Realty Co.*, 668 P.2d 535, 537, 542-43 (Sup. Ct. Utah 1983) (*Vasquez* applied to "a small fraction of the total number [108] of unit owners"); *Occidental Land, Inc. v. Superior Court of Appeals of Orange Cty.*, 556 P.2d 750, 754 (Sup. Ct. Cal. 1976). A consistent approach was taken on an express warranty claim, as to "basis of the bargain," in *Cipollone,* 893 F.2d at 568. Texas law recognizes a "... presumption that reliance in good faith was had upon such assurances," where the assurances were from the plaintiff's supervisor that use of their handcar was safe, *Beck v. Texas Co.* 148 S.W. 295, 298, 299-300 (Tex. 1912), just as Respondents tell young and addicted

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6 (a) We accept an interest in people's health as a basic responsibility, *paramount to every other consideration in our business.* (emphasis supplied)

(b) In addition there will be an Advisory Board of scientists *disinterested in the tobacco industry.* (emphasis supplied) (R. 4039, 3528)

smokers that cigarettes are safe, *supra*, 21-22, and *supra*, 22-*infra*, 29.

(c) AT, TI, and CTR publications after 1947, other than the "Frank Statement," appear at: AT, R.4807-4787; CTR, R.3896-3879; and TI, R.888-852, 827-425. RJR made no *Celotex* challenge to Allgood's post-1947 reliance. Throughout his life Allgood was an avid reader and kept up with current events. (R.3691-3686, 3684-3682; 3741-3740; 3675, 3674-3669; 278) This evidence provides a reasonable inference that, if Allgood had access to Respondents' publications, he probably read them. From March, 1957 to February, 1959, and from August, 1964 on (except for two brief hospital stays and one year in Louisiana), Allgood lived in the Houston–Texas City–LaMarque area and he read *The Houston Post*, *The Houston Chronicle*, the *Galveston Daily News*, the *Texas City Sun*, *Reader's Digest*, *Time*, *Life*, *McCall's*, and *National Geographic*. (R.4092-4091, 3675)

(1) Petitioners' evidence of Allgood's access to TI's publications, and of his justifiable reliance on them:

(aa) A 1970 TI memorandum (R.896) has "TI Mailing List" at the top. A 1979 TI ad (R.887) bears this statement:

> This is a message from The Tobacco Institute, appearing from late June through July, 1979, in all Sunday newspaper magazine sections, Time, Newsweek, U.S. News and World Report, and in a number of farm and trade publications.

This ad is the only summary judgment evidence of the specific distribution of TI's messages, and is evidence of a pattern of distribution of TI's ads that should be taken to include at least the major metropolitan newspapers, such as *The Houston Chronicle* and *The Houston Post*, and the major popular magazines. Under Texas' rebuttable presumptions, TI's ads appeared at least in these papers at all relevant times, whether earlier, *Ross v. Green*, 139 S.W.2d 565, 570-573

(Comm. App., 1940, opinion adopted), or later, *Mayhew v. McFarland*, 153 S.W.2d 428, 431 (Tex. 1941).

(bb) That express mentions of TI's "it's not proven" message appeared in *The Houston Chronicle* and *The Houston Post*, is shown in a collection of copies of articles from these papers (R.884-852). While these articles are from 1991 to 1994, and 1967-87, they are evidence under Texas' rebuttable presumptions that TI's message appeared in these papers at all relevant times. *Ross*, *Mayhew*.

(cc) With Allgood probably having read the materials described in paragraph (bb), proof that he justifiably relied on them is in Dr. Grabowski's and Mr. Crainer's testimonies, *supra*, 24. Further, since Allgood probably read TI's message, the *Vasquez* line of cases' inference of justifiable reliance, *supra*, 25-26, should apply here, given TI's "mass media advertising hype." *Amato v. General Motors Corp.*, 463 N.E.2d 625, 628 (Ohio Ct. of Appeals 1982).

TI mass media advertising hype is evidenced in a May, 1972 memo from Fred Panzer to Horace Kornegay. Horace Kornegay was President, and Fred Panzer was Vice-President, of TI. (R.841, 840, 834, 833) The memo contains admissions of TI by Mr. Panzer, F. R. Civ. E. Rule 801(d)(2)(A), (C), and (D), that "for nearly twenty years this industry has employed a single strategy to defend itself ... [I]t has always been a holding strategy, consisting of[:] ... creating doubt about the health charge without actually denying it ...", (R.845), i.e., the TI message: not "smoking isn't harmful," but "there's no conclusive proof that it is."

TI mass media advertising hype is also evidenced by TI publications (R.826-435). Total cost for the "Position Paper" distribution was $918,000 in 1968 dollars (R.958-957), probably national coverage. On the reasonable inference that distribution of these publications was similar, "communicators" (R.957) would include editors, and the other addressees would spread the message if not the print. Other evidence of

distribution to editors is an August, 1961 TI note to editors, and June, 1971 and May, 1972 Sr. V. P. William Kloepfer form letters to editors. (R.433-431)

(2) Petitioners' evidence of access against CTR are the examples of CTR publications at R.3896-3879, and the CTR November, 1984 address list. (R.3576-3531) This list shows all major U.S. newspapers including the *Houston Post* and the *Houston Chronicle* (R.3531), which Allgood read. (R.3675) The rebuttable presumptions apply, that CTR published its "it's not proven" message in these papers at all relevant times. *Ross*, *Mayhew*. The proofs of justifiable reliance are *supra*, 24.

(3) Petitioners' evidence of access against AT are examples of its Pall Malls ads (R.4807-4787), which run from 1951 to 1961, and show that they were published in "American Weekly," a Sunday supplement used in all major American newspapers during that period. It is a reasonable inference that AT always published its ads in a way to achieve similar national exposure. *Ross*, *Mayhew*. So wherever Allgood was stationed or resided stateside, which he was from May, 1953 to July, 1955, March, 1957 to February, 1959, and from August, 1964 on, *supra*, 26, it is a reasonable inference that he read the major newspapers and saw the AT ads, *supra*, 26. The proofs of justifiable reliance are *supra*, 24-26.

(d) Attempting to negate reliance on fraud, the Court of Appeals cited Dr. Grabowski's opinion as to the addicted Allgood: "Mr. Allgood appears to have been unable to quit without the direct and personal threat of imminent death" (R.3828), and Bonnie Allgood's testimony that he "was so addicted that no amount of warning could induce him to quit." (App. 7a) Both appear directed to the argument that if no warnings could make the addicted Allgood quit, Respondents' telling him the truth wouldn't make him quit, i.e., but-for cause-in-fact is negated. But the Court of Appeals ignored

that Dr. Grabowski also states that there are several contributing causes, including fraud, of Allgood's inability to quit, each being accountable to one or more Defendants:

(1) Nicotine dependence was the *primary* determinate of Allgood's continued tobacco use (R.3828), RJR and AT having caused his nicotine dependence: RJR's and AT's advertising was a substantially contributing factor in young Allgood's pre-1949 continuing to smoke. *Supra*, 21-22. RJR and AT negligently failed to warn Allgood by 1942 of smoking's dangers, which done suitably, probably would have made him stop. (R.4889-4888, 4886-4885, 4881-4879) RJR's and AT's unreasonably dangerous cigarettes (R.3826-3746) addicted Allgood by 1949 (R.4961, 4960, 3829).

(2) AT's, RJR's and CTR's fraudulent "Frank Statement," *supra*, 13 n.4, and TI's and CTR's messages that the proofs that smoking is harmful to health aren't conclusive, *supra*, 26-28, and AT's and RJR's ads portraying smoking as healthy (the same as saying that the proofs that smoking is harmful to health aren't conclusive), *supra*, 18-19, 28, and by reasonable extension, Respondents' fraudulent concealment of the addictiveness of, and that death and disease were caused by, smoking, were substantially contributing factors in keeping Allgood smoking. *Supra*, 24.

(3) The cause-in-fact rule in this case is not "but-for":

> Where the tortious acts of two or more wrongdoers join to produce an indivisible injury, that is, an injury which from its nature cannot be apportioned with reasonable certainty to the individual wrongdoers, all of the wrongdoers will be held jointly and severally liable for the entire damages ...

Landers v. East Texas Salt Water Disposal Co., 248 S.W.2d 731, 734-35 (Tex. 1952) *Strakos v. Gehring*, 360 S.W.2d 787, 794 (Tex. 1962).

C. "Common Knowledge" Theory (App. 7a-8a).

AT never pled the affirmative defense of common knowledge. (R.2441) Motion cut-off was June 1, 1994. (Dkt. No. 64.) AT waived this defense. F. R. Civ. P. 8(c).

The Court of Appeals properly limited this theory to "claims alleging [a 'duty to warn Allgood of the dangers of smoking']," and also properly quoted *McGuire*, 814 S.W.2d at 388, that "common knowledge" means "beyond dispute." But the Court of Appeals only cited *Roysdon v. R.J. Reynolds Tobacco Co.*, 849 F.2d 230 (6th Cir. 1988), and *Paugh v. R.J. Reynolds Tobacco Co.*, 834 F. Supp. 228 (N.D. Ohio 1993), which state conclusions about "common knowledge" without expert testimony or reference to any authoritative text, such as those the Texas Supreme Court relied on in determining that the dangers of excessive use of alcohol were known "from ancient times." *McGuire*, 814 S.W.2d at 388. The Court of Appeals also, contrary to *Anthony*, disregarded the uncontradicted testimonies of Petitioners' public health and epidemiology expert, Dr. Whelan, and Respondents' medical history expert, Dr. Hudson, that before the mid-1950s, the dangers to health of smoking were not "beyond dispute," (R.4951-4949, 4947, 4944). Petitioners' duty to warn claims assert negligence and marketing defect as of 1942. (R.2053) Further, breach of either an express or an implied warranty does not depend on a duty to warn. *See Cipollone*, 505 U.S. at 524-27.

CONCLUSION

A writ of certiorari should be granted to review the decision of the Fifth Circuit Court of Appeals.

Respectfully submitted,

Alden D. Holford
Counsel for Petitioners

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 95-20363

MRS. SAMUEL E. ALLGOOD, INDIVIDUALLY AND AS INDEPENDENT EXECUTRIX OF THE ESTATE OF SAMUEL E. ALLGOOD, MARCUS ALLGOOD AND MALCOLM ALLGOOD,
Plaintiffs - Appellants,

v.

R. J. REYNOLDS TOBACCO COMPANY; THE AMERICAN TOBACCO COMPANY; THE TOBACCO INSTITUTE, INC.; THE COUNCIL FOR TOBACCO RESEARCH-U.S.A., INC. ,
Defendants - Appellees.

ON PETITION FOR REHEARING
(May 16, 1996)

Before POLITZ, Chief Judge, GOODWIN* and DUHÉ, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is DENIED.

ENTERED FOR THE COURT:

/S/ Henry A. Politz
HENRY A. POLITZ
CHIEF JUDGE

* Circuit Judge of the Ninth Circuit, sitting by designation.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 95-20363

MRS. SAMUEL E. ALLGOOD, INDIVIDUALLY AND AS INDEPENDENT EXECUTRIX OF THE ESTATE OF SAMUEL E. ALLGOOD, MARCUS ALLGOOD AND MALCOLM ALLGOOD,

Plaintiffs - Appellants,

v.

R. J. REYNOLDS TOBACCO COMPANY; THE AMERICAN TOBACCO COMPANY; THE TOBACCO INSTITUTE, INC.; THE COUNCIL FOR TOBACCO RESEARCH-U.S.A., INC. ,

Defendants - Appellees.

Appeal from the United States District Court
for the Southern District of Texas

OPINION
(April 16, 1996)

Before POLITZ, Chief Judge, and GOODWIN and DUHÉ, Circuit Judges.

GOODWIN, Circuit Judge:

Samuel Allgood, a lifetime smoker, died from complications relating to throat cancer in January of 1989. His family appeals a summary judgement on all claims in their action against defendants R.J. Reynolds Tobacco Company (Reynolds); The American Tobacco Company (AT); The Tobacco Institute, Inc. (TI); and The Council for Tobacco Research–U.S.A., Inc. (CTR). We affirm.

Plaintiffs claimed that defendants tortiously contributed to Allgood's death through fraudulent misrepresentations regarding defendants' efforts to discover the health consequences of cigarette smoking, fraudulent concealment of the health risks of smoking, negligence in the production and marketing of cigarettes, breach of implied and express warranties, and the defective design and marketing of cigarettes.

A. *Statute of Limitations*

1. *Negligence, Conspiracy and Product Liability Claims*

Plaintiffs may bring those personal injury claims which Allgood himself could have brought immediately prior to his death. *Russell v. Ingersoll-Rand Co.*, 841 S.W.2d 343, 345 (Tex.1992). Accordingly, for purposes of the statute of limitations the relevant dates are the date the claims accrued and the date of Allgood's death. Generally, a claim accrues at the time of the tortious behavior. However, under the "discovery rule," a claim does not accrue until the plaintiff knows, or should know, of the resulting injury. *Nelson v. Krusen*, 678 S.W.2d 918 (Tex.1984).

The record establishes that Allgood knew, or should have known, of a relevant injury in February 1986. According to the affidavit of Dr. Bruce Kenamore, on that date he told Allgood that he had emphysema and must stop smoking. The doctor's advice provides a sufficient basis for the statute of limitations to begin running, and places its expiration date prior to Allgood's death in 1989. Tex.Civ.Prac. & Rem.Code § 16.003(a) (providing for a two year statute of limitations for personal injury claims).

Plaintiffs' attempts to undercut Dr. Kenamore's affidavit are unavailing. Mere allegations that Dr. Kenamore may have been mistaken, without supporting evidence, are insufficient to defeat a motion for summary judgement.

Plaintiffs' argument that the doctrine of continuing tort tolled the statute of limitations until the time when the tor-

tious injury ceased--that is when Allgood stopped smoking in February of 1987--is also misguided. While Texas has applied the theory of continuing tort in a drug addiction case, Texas has limited its application to cases where the causal relation between action and injury remained unknown to the plaintiff. *Upjohn Co. v. Freeman*, 885 S.W.2d 538, 542 (Tex.Ct.App.1994, error denied). In Freeman, the court allowed a plaintiff to maintain an action for the entire course of his treatment rather than just those portions of treatment within the statute of limitations period where he alleged the tortious prescription of the drug Halcion. However, the court stated "[i]f Freeman had discovered his injury and its cause, the rationale for the continuing-tort rule would no longer apply, and the statute would commence to run at that point." *Id.* at 544.

The question we face here is similar. The causal relationship between smoking and Allgood's injuries was known to Allgood at least as early as February 1986. Therefore, the theory of continuing tort is immaterial in this case because the statute of limitations began to run in February of 1986, and had expired prior to Allgood's death.

2. *Breach of Warranty Claims*

Plaintiffs claim that defendants breached both implied and express warranties when they sold cigarettes which could cause fatal diseases. The implied warranties related to the cigarettes' merchantability and fitness for a particular use. The express warranties allegedly arose from various advertisements, including "A Frank Statement to Smokers," and warranted against adverse health effects. The ads contained such statements as "[Pall Mall's] are mild!;" "guard against throat scratch [Pall Mall];" "get satisfying flavor so friendly to your taste [Pall Mall];" "protect your 'T' [throat and taste] zone [Camels];" "No Throat Irritation Due to Smoking Camels [in thirty day smoking test];" and "More Doctors Smoke Camels Than Any Other Cigarette."

(a) Defendants TI and CTR

Under Texas law only actual sellers are liable for breach of warranty, not trade associations or public relations agents who play a role in distribution. *Arceneux v. Lykes Bros. Steamship Co., Inc.*, 890 S.W.2d 191 (Tex.Ct.App.1994). Even where a party has promoted a product, and made promises regarding that product, if the party is not the actual seller a claim for breach of warranty will not lie. *Charles E. Beard, Inc. v. Cameronics Technology Corp., Ltd.*, 729 F.Supp. 528 (E.D.Tex.1989), aff'd., 939 F.2d 280 (5th Cir.1991). Plaintiffs have provided no evidence of manufacture or sale on the part of edifier TI or CTR. In contrast, TI and CTR have submitted affidavits stating that they have never manufactured or sold cigarettes. Summary judgement on behalf of the TI and CTR was free from error.

(b) Defendants Reynolds and AT

The district court properly granted summary judgement in favor of Reynolds and AT on the warranty claims. Under Texas law, warranty claims accrue on the date of sale and the statute of limitations extends for four years. Tex.Bus. & Com. § 2.725. Allgood last purchased Reynolds' cigarettes sometime before 1957, long before his death. Thus, the statute of limitations bats plaintiffs' claims against Reynolds. Similarly, with the exception of those claims arising from Allgood's purchase of American Tobacco cigarettes during the four year statutory period, the statute of limitations bars the breach of warranty claims against American Tobacco.

Plaintiffs argue that their claims survive, nonetheless, because of a tolling of the statute of limitations during the interim period. Texas allows the tolling of the statute of limitations for warranty claims only when there is an express warranty which explicitly extends to future performance. *Safeway Stores, Inc. v. Certainteed Corp.*, 710 S.W.2d 544 (Tex.1986). None of the statements or ads relied upon by plaintiffs explicitly extend to future performance. Indeed, at

most the ads could be construed to guarantee only transitory pleasure from the smoking of cigarettes. *See Gunsalus v. Celotex Corp.*, 674 F.Supp. 1149, 1155 (E.D.Pa.1987) (holding that the American advertisements promised "smoker satisfaction that could be evaluated by the user immediately", but did not "constitute express warranties of future performance as a matter of law). Further, the only case plaintiffs cite to support their warranty theory involved ads with more explicit claims of health guarantees. *Cipollone v. Liggett Group, Inc.*, 893 F.2d 5 41, 575-576 (3rd Cir.), aff'd in part, rev'd in part on other grounds 505 U.S. 504, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992). Therefore, warranty claims accrued at the time of sale and are barred by the statute of limitations.

B. *Claims for Fraudulent Misrepresentation and Concealment*

Plaintiffs claim that defendants' "A Frank Statement to Smokers" and the industry's general "it's not proven" campaign misrepresented the health risks of smoking to consumers. Plaintiffs allege that the "Frank Statement" fraudulently concealed the true purpose of the tobacco companies, lulling Allgood into a false sense of security regarding his health and smoking. Plaintiffs also allege that defendants discovered the health risks of tobacco through their research, and fraudulently concealed that information from the public, including Allgood.

To the extent that plaintiffs' claims are based on fraudulent concealment or a failure to warn after 1969, they are preempted by the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. 1331-1340. *Cipollone v. Liggett Group, Inc.* , 505 U.S. 504, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992) (plurality opinion).

As for the claims not preempted by Cipollone, the district court properly granted summary judgement. The evidence that Allgood relied upon the alleged misrepresentations, an essential element of both affirmative fraud and fraudulent

concealment, is insufficient as a matter of law. The most plaintiffs' affidavits and depositions have been able to show is that Allgood read news periodicals during the time period the alleged misrepresentations were made. This proof does not prove that be read the misrepresentations, however, and falls far short of proving he actually relied upon them. Indeed plaintiffs' own expert testified that Allgood would have continued smoking absent an immediate and personal life threatening situation. In addition, his wife's deposition admitted that he was so addicted that no amount of warning, could induce him to quit. Given this faiiure of proof on the essential element of reliance, summary judgement was appropriate.

C. *"Common Knowledge" Theory*

Plaintiffs argue that the district court erred in ruling that all claims based on a failure to warn were barred for the alternative reason that the risks of cigarette smoking were within the "common knowledge." *Joseph E. Seagram & Sons v. McGuire*, 814 S.W.2d 385, 387 (Tex.1991). In *McGuire*, the Texas Supreme Court held that alcohol producers had no duty to disclose the dangers of alcohol because such dangers were within the common knowledge of the public.

> The existence of a duty to warn or instruct in this cause is thus determined by the extent to which the danger of developing the disease of alcoholism from prolonged and excessive consumption of alcoholic beverages is "common knowledge." [Footnote omitted.] Encompassed within the term "common knowledge" are those facts that are so well known to the community as to be beyond dispute.

Id. at 388.

Like the dangers of alcohol consumption, the dangers of cigarette smoking have long been known to the community. *See e.g. Roydson v. R.J. Reynolds Tobacco Co.*, 849 F.2d

230, 236 (6th Cir.1988); *Paugh v. R.J. Reynolds Tobacco Co.*, 834 F.Supp. 228, 230-231 (N.D.Ohio 1993). Therefore, defendants had no duty to warn Allgood of the dangers of smoking, and summary judgement was appropriate for claims alleging such a duty. This holding covers the warranty claims for AT cigarettes which survived the statute of limitations challenge. Accordingly, all claims were properly dismissed.

D. *Discovery Issues*

Plaintiffs also appeal the district court's orders denying plaintiffs' motion to compel documents and granting defendants' motion for a protective order and the return of produced documents. We first note that plaintiffs failed to properly raise these issues in this court. Instead of briefing the issues, which would have extended their brief beyond the page limit, plaintiffs attempted to incorporate their motion papers from the district court by reference in this court. We noted our disapproval of such tactics in *Bobsee Corp. v. United States*, 411 F.2d 231, 234 n.2 (5th Cir.1969). The court does not look upon such conduct with any more favor today than it did then. Nonetheless, we will address the merits of plaintiffs' claims, reviewing for abuse of discretion.

1. *Motion to Compel "Special Project" Documents*

Plaintiffs sought the production of documents protected by the attorney/client, privilege by attempting to invoke the crime/ fraud exception. *United States v. Zolin*, 491 U.S. 554, 109 S.Ct. 2619, 105 L.Ed.2d 469 (1989). Plaintiffs claim that the special project documents are sufficient to make out a prima facie case because a district court had formerly determined they made out a prima facie case under the crime/fraud exception. *Haines v. Liggett Group, Inc.*, 140 F.R.D. 681 (1992), order vacated on other grounds 975 F.2d 81 (3rd Cir.1992). However, one court's finding of a prima facie case does not automatically make another court's rejection of the same finding an abuse of discretion. Given the

absence of any other evidence of misdeed, we can not say the district court abused its discretion.

2. *Motion for Protective Order and Return of Documents*

Plaintiffs argue that the district court erred in requiring them to return two documents inadvertently produced by defendants. This circuit allows courts to determine on a case-by-case basis whether an inadvertent disclosure results in the waiver of privilege. Here, the district court believed the circumstances did not warrant waiver of the privilege. Plaintiffs have not presented to this court evidence to the contrary. We find no abuse of discretion.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

MRS. SAMUEL E. ALLGOOD, INDIVIDUALLY AND AS INDEPENDENT EXECUTRIX OF THE ESTATE OF SAMUEL E. ALLGOOD, MARCUS ALLGOOD AND MALCOLM ALLGOOD,

Plaintiffs,

v.

R. J. REYNOLDS TOBACCO COMPANY; THE AMERICAN TOBACCO COMPANY; THE TOBACCO INSTITUTE, INC.; THE COUNCIL FOR TOBACCO RESEARCH-U.S.A., INC. ,

Defendants.

CIVIL ACTION NO. H-91-0158

ENTERED
JUN 14 1995
Michael N. Milby, Clerk

ORDER

This case is before the Court on Plaintiff's Motion for Reconsideration and New Trial. The Court has reviewed the record in this case and finds that its order of April 3, 1995, was correct and proper. Accordingly, IT IS HEREBY

ORDERED that the Motion for Reconsideration and New Trial is DENIED,

The Clerk shall enter this Order and provide a copy to all parties.

SIGNED on June 13, 1995, at Houston, Texas.

/S/ Vanessa D. Gilmore
VANESSA D. GILMORE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

MRS. SAMUEL E. ALLGOOD, INDIVIDUALLY AND AS INDEPENDENT EXECUTRIX OF THE ESTATE OF SAMUEL E. ALLGOOD, MARCUS ALLGOOD AND MALCOLM ALLGOOD,

Plaintiffs,

v.

R. J. REYNOLDS TOBACCO COMPANY; THE AMERICAN TOBACCO COMPANY; THE TOBACCO INSTITUTE, INC.; THE COUNCIL FOR TOBACCO RESEARCH-U.S.A., INC. ,

Defendants.

CIVIL ACTION NO. H-91-0158

ENTERED
JUN 13 1995
Michael N. Milby, Clerk

ORDER

Before the Court is Plaintiffs' Motion in Opposition to Defendants' Bills of Cost (Instrument No. 258). On consideration of defendants R.J. Reynolds', American Tobacco's, and The Council for Tobacco Research's Bills of Cost (Instruments Nos. 253, 257, and 252) and the motion, the Court is of the opinion that justice requires that the motion should be GRANTED. It is, therefore,

ORDERED and ADJUDGED that the Defendants Bills of Cost are disallowed and Defendants, including The Tobacco Institute shall not recover any costs against Plaintiffs.

SIGNED this 13th day of June, 1995.

/S/ Vanessa D. Gilmore
VANESSA D. GILMORE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

MRS. SAMUEL E. ALLGOOD, INDIVIDUALLY AND AS INDEPENDENT EXECUTRIX OF THE ESTATE OF SAMUEL E. ALLGOOD, MARCUS ALLGOOD AND MALCOLM ALLGOOD,

Plaintiffs,

v.

R. J. REYNOLDS TOBACCO COMPANY; THE AMERICAN TOBACCO COMPANY; THE TOBACCO INSTITUTE, INC.; THE COUNCIL FOR TOBACCO RESEARCH-U.S.A., INC. ,

Defendants.

CIVIL ACTION NO. H-91-0158

ENTERED
APR 3 1995
Michael N. Milby, Clerk

FINAL JUDGMENT

For the reasons stated in the Magistrate's Judge Mary Milloy's Amended Memorandum and Recommendation which was adopted by this Court by Order signed on April 3, 1995, this action is dismissed.

THIS IS A FINAL JUDGMENT.

The Clerk will enter this order and provide all parties with a true copy.

SIGNED this 3rd day of April, 1995.

/S/ Vanessa D. Gilmore
VANESSA D. GILMORE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

MRS. SAMUEL E. ALLGOOD, INDIVIDUALLY AND AS INDEPENDENT EXECUTRIX OF THE ESTATE OF SAMUEL E. ALLGOOD, MARCUS ALLGOOD AND MALCOLM ALLGOOD,

Plaintiffs,

v.

R. J. REYNOLDS TOBACCO COMPANY; THE AMERICAN TOBACCO COMPANY; THE TOBACCO INSTITUTE, INC.; THE COUNCIL FOR TOBACCO RESEARCH-U.S.A., INC. ,

Defendants.

CIVIL ACTION NO. H-91-0158

ENTERED
APR 3 1995
Michael N. Milby, Clerk

ORDER ADOPTING MAGISTRATE JUDGE'S MEMORANDUM AND RECOMMENDATION

The Court has reviewed the Memorandum and Recommendation (Instrument No. 234) signed by Magistrate Judge Mary Milloy on September 27, 1994 and all the objections thereto and the Amended Memorandum and Recommendation (Instrument No. 241) signed by Magistrate Judge Mary Milloy on, November 7, 1994, regarding Instrument Nos. 121, 125, 128, 138, 189 and 192, and all objections thereto, and is of the opinion that said Amended Memorandum and Recommendation should be adopted by this Court. It is therefore

ORDERED, ADJUDGED and DECREED that United States Magistrate Judge Milloy's Amended Memorandum and Recommendation is hereby adopted by this Court.

The Clerk shall enter this order and provide all parties with a true copy.

SIGNED this 3rd day of April, 1995.

/S/ Vanessa D. Gilmore
VANESSA D. GILMORE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

MRS. SAMUEL E. ALLGOOD, INDIVIDUALLY AND AS INDEPENDENT EXECUTRIX OF THE ESTATE OF SAMUEL E. ALLGOOD, MARCUS ALLGOOD AND MALCOLM ALLGOOD,

Plaintiffs,

v.

R. J. REYNOLDS TOBACCO COMPANY; THE AMERICAN TOBACCO COMPANY; THE TOBACCO INSTITUTE, INC.; THE COUNCIL FOR TOBACCO RESEARCH-U.S.A., INC. ,

Defendants.

CIVIL ACTION NO. H-91-0158

FILED
NOV 7 1994
Michael N. Milby, Clerk

AMENDED MEMORANDUM AND RECOMMENDATION ON DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

This matter was referred to the undersigned by Vanessa D. Gilmore, United States District Judge, under 28 U.S.C. § 636(b)(1)(A) and (B). The following motions are subject to a resolution: Motion for Summary Judgment of Defendant The Council for Tobacco Research -- U.S.A., Inc. (Docket Entry #128); Defendant R. J. Reynolds Tobacco Company's Motion for Partial Summary Judgment (Docket Entry #125); Defendant the American Tobacco Company's Motion and Memorandum of Law in Support of Partial Summary Judgment (Docket Entry #128); The Tobacco Institute's Motion and Memorandum in Support of Partial Summary Judgment (Docket Entry #138); Motion for Summary Judgment of

Defendants R. J. Reynolds Tobacco Company and the American Tobacco Company (Docket Entry #189); and Motion of the Tobacco Institute for Summary Judgment (Docket Entry #192). Upon consideration of the motions, all responses, replies, the argument of counsel, **objections to the original memorandum**, and the applicable law, it is recommended that the motions be GRANTED.

Preface

On September 27, 1994, the Court recommended that summary judgment be granted in favor of each Defendant. The recommendation was based on either a statute of limitations bar, or because no genuine issues of material fact had been raised on elements necessary to Plaintiffs' claims. In response to that recommendation, the parties filed timely objections and responses. On November 1, 1994, counsel were advised that the original recommendation would be amended due to an incorrect statement on the applicable Texas statute of limitations for a fraud action. Because Plaintiffs' fraud claims were originally assessed as governed by a two-year statute of limitations, the Court did not entertain the merits of Defendants' motions on any other grounds. Accordingly, the Memorandum and Recommendation entered on September 27, 1994 (Docket Entry #234) is hereby VACATED and this Amended Memorandum And Recommendation On Defendants' Motions For Summary Judgment is SUBSTITUTED in its place.

To avoid unnecessary delay, and in an attempt to eliminate confusion, Plaintiffs' fraud allegations are addressed in this amended recommendation at section "III. B." Further, to the extent that the expanded analysis of the fraud claims requires modification of any other statements in the original recommendation, those will be reflected in bold face type. The remainder of the original recommendation is repeated herein to provide the context for the recommendation on Plaintiffs' claims for fraud. For the reasons detailed below,

the Court's conclusion that summary judgment is appropriate has not changed. Due to the limited scope of this amendment, any objections to it are to address only the modifications and additions. Objections already lodged to the original Memorandum and Recommendation are preserved.

I. Background

Samuel E. Allgood ("Allgood") began smoking cigarettes, **regularly**, in 1941, at the age of twelve. When Allgood began the habit, he smoked "Camel" cigarettes. At an unspecified time, prior to 1956, Allgood switched brands and began smoking "Pall Malls". He continued to smoke "Pall Malls" regularly until February 16, 1987, when he was diagnosed as suffering from cancer of the larynx. Allgood quit smoking immediately after that diagnosis. He died from a cancer related health complication on January 23, 1989. Bonnie Allgood, his widow, was appointed as executrix of his estate on August 8, 1989.

On January 4, 1991, Bonnie Allgood filed this wrongful death and survival action seeking to recover for her husband's death. Mrs. Allgood is joined in this suit by Allgood's two adult sons, Malcolm and Marcus Allgood. Plaintiffs allege that Allgood's cancer and subsequent death resulted from smoking cigarettes. Plaintiffs have named the Center for Tobacco Research -- U.S.A., Inc. ("CTR"), the Tobacco Institute ("TI"), the American Tobacco Company ("American"), and the R. J. Reynolds Company ("Reynolds") as Defendants.

CTR is a non-profit corporation that was created in 1971 to fund medical research on smoking and its effects. TI is a trade association located in Washington, D.C. Its members are various tobacco companies and cigarette manufacturers. American manufactures "Pall Malls", one of the brands that Allgood smoked. Reynolds manufactures "Camels", the other brand of cigarettes that Allgood reportedly smoked.

Plaintiffs maintain that Defendants failed to adequately warn Allgood of the dangers of smoking and, instead, advertised cigarettes as something healthy and socially attractive. Plaintiffs also claim that Reynolds, American, CTR and TI conspired to prevent information adverse to the tobacco industry from reaching the public. This was allegedly accomplished by publishing and disseminating information that was designed to promote the interests of the tobacco industry and to further the belief that smoking is not harmful. In support of this contention, Plaintiffs rely on several advertisements published by American between 1951 and 1961, as well as a newspaper article/ advertisement published by CTR's predecessor, the Tobacco Industry Research Committee, titled "A Frank Statement to Cigarette Smokers" ("Frank Statement"). Plaintiffs' causes of action against each Defendant sound in negligence, fraud, breach of warranty, conspiracy and products liability. Each Defendant seeks the entry of summary judgment in its favor.

II. Standard of Review

In considering a motion for summary judgment, a court must review the material factual issues and give the non-moving party the benefit of every reasonable inference with respect to the facts alleged by that party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); Trevino v. Celanese Corp., 701 F.2d 397, 407 (5th Cir. 1983). The entry of summary judgment is appropriate only if "there is no genuine issue as to any material fact." Fed. R. Civ. P. 56(c). "A dispute about a material fact is genuine if the 'evidence is such that a reasonable jury could return a verdict for the non-moving party.'" Davis v. Chevron U.S.A., Inc., 14 F. 3d 1082, 1084 (5th Cir. 1994) (citation omitted).

The burden is on the moving party to convince the court that no genuine issue of material fact exists as to the claims asserted by the non-movant. Celotex Corp. v. Catrett, 477 U.S. 317, 322-323 (1986). The non-moving party may not

rest solely on its pleadings, however. For issues on which the non-movant will bear the burden of proof at trial, that party must produce summary judgment evidence and designate specific facts which indicate that there is a genuine issue for trial. Celotex, 477 U.S. at 322-324.

The non-movant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Inc. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-587 (1986). To meet its burden, the non-moving party must present "significant probative" evidence indicating that there is a triable issue of fact. Conkling v. Turner, 18 F.3d 1285, 1295 (5th Cir. 1994). However, if the evidence rebutting the summary judgment motion is only colorable or not significantly probative, summary judgment should be granted. Anderson, 477 U.S. at 249-250.

III. Analysis

Federal courts sitting in diversity must apply the substantive law of the forum state. Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938). When faced with a limitations question, federal courts likewise look to the law of the forum state. Johansen v. E. I. Du Pont De Nemours & Co., 810 F. 2d 1377, 1380 (5th Cir. 1987). Because this is a diversity action, the Court will apply Texas law.

A. Statutes of Limitations

1. Negligence, Conspiracy and Strict Liability/ Design Defect claims

Plaintiffs have brought both a wrongful death action and a survival action against Defendants. A survival action is one that seeks recovery for the wrongs that "the decedent suffered before his death" and the "damages recoverable are those which he himself sustained while he was a live." Russell v. Ingersoll-Rand Co., 841 S.W.2d 343, 345 (Tex. 1992). A wrongful death action, on the other hand, allows the beneficiaries of the deceased to recover for that alleged

wrong which brought about the death. Russell, 841 S.W.2d at 346. Defendants contend that Plaintiffs' wrongful death and their survival action are both barred by the statute of limitations.

In the context of this case, Plaintiffs' claims for personal injury as a result of negligence, conspiracy, and their strict liability/design defect claims are all governed by the two year statute of limitations that is set out in Section 16.003(a) of the Texas Civil Practice and Remedies Code.[1] Defendants contend that the statute of limitations on Plaintiffs' claims began to run in February of 1986, when Allgood was informed by his doctor that he had developed emphysema as a result of his smoking. (Memorandum of Law in Support of Defendants R. J. Reynolds Tobacco Company's and the American Tobacco Company's Motion for Summary Judgment, pp. 21-22; Exhibit S) [hereinafter "Defendants' Memorandum of Law"]. Defendants conclude that the limitations period on Allgood's claims expired two years later, in February of 1988, eleven months before Allgood's death. Defendants note that under Russell, both wrongful death and survival actions are considered to be derivative of the decedent's rights and are, therefore, barred if "the decedent could not maintain an action in his own right immediately prior to his death. Russell, 841 S.W.2d at 348. Defendants argue that Russell requires a dismissal because the limitations period on Allgood's claims expired before his death.

Defendants further argue that this result is not changed simply because Allgood's cancer was not diagnosed until February 17, 1987. They contend that under Texas law, the statute of limitations begins to run from the date that a plaintiff first discovers that he may have been harmed by a prod-

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1 **Plaintiffs' claims for fraud and for breach of warranty will be addressed separately.**

uct, and not at some later time when he may discover another, additional injury also caused by the product. In Moreno v. Sterling Drug, Inc., 787 S.W.2d 348, 351 (Tex. 1990), the Texas Supreme Court noted that "[f]or the purposes of the application of limitations statutes, a cause of action can generally be said to accrue when the wrongful act effects an injury." For a limitations period to commence, the injured party need only have discovered, or have had a reasonable opportunity to discover, facts sufficient to put him on notice that he has been injured and in general terms, the cause of the injury. Coody v. A. H. Robins Co., Inc., 696 S.W.2d 154, 156 (Tex. App.--San Antonio 1985, writ dism'd by agr.).[2] Texas recognizes that a "cause of action inheres in the causative aspects of a breach of a legal duty, the wrongful act itself, and not in the various forms of harm which result therefrom." Pecorino v. Raymark Industries, Inc., 763 S.W.2d 561, 570 (Tex. App.--Beaumont 1988, writ denied), *quoting*, Gideon v. Johns-Manville Sales Corp., 761 F.2d 1129, 1136 (5th Cir. 1985). Thus, once an injury results, the cause of action accrues "whether or not all the injuries have become manifest." *Pecorino*, 763 S.W.2d at 571 (citation omitted). A case particularly on point, is Davenport v. Phillip Morris, Inc., 761 S.W.2d 70 (Tex. App.--Houston (14th Dist.] 1988, no writ).

In Davenport, the decedent's wife and children filed both a survival action and a wrongful death action against "six cigarette manufacturers, four cigarette distributors, a scientific organization, and a tobacco industry group" alleging that Mr. Davenport's death was caused by smoking cigarettes.

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[2] In citing this case, and the cases that follow, the Court recognizes that [o]pinions of the Texas Courts of Appeals are indicia of state law,' which should be followed by the federal courts sitting as 'Erie courts' absent a 'strong showing that the state supreme court would rule differently."' ***Willis v. Roche Biomedical Laboratories, Inc.*, 21 F.3d 1368 (5th Cir. 1994) (quoting *Lavespere v. Niagara Machine & Tool Works, Inc.*, 920 F.2d 259, 260 (5th Cir. 1990)).**

The plaintiffs later abandoned their survival action, and the defendants moved for summary judgment on the wrongful death claim, arguing that plaintiffs' suit was barred by the statute of limitations. The trial court granted the defendants' motion and the Texas court of appeals affirmed. The court of appeals noted, at the outset, that Mr. Davenport had been advised nine years before his death that he suffered from emphysema and cardiovascular problems associated with cigarette smoking. Davenport, 761 S.W.2d at 71. The appellate court found that the "potential cause of action was one for the injuries incurred by the deceased which were caused by his cigarette smoking", and held that the statute of limitations on that potential cause of action began to run when Mr. Davenport learned that he was suffering from a smoking related disease. Davenport, 761 S.W.2d at 72. Accordingly, the court held that the plaintiffs' wrongful death action was barred because the limitations period on Mr. Davenport's claim had expired before his death. Davenport, 761 S.W.2d at 72.

In response to Defendants' argument, Plaintiffs attempt to raise an issue of material fact by claiming that Allgood was not told by his physicians that he had emphysema in 1986. Plaintiffs point out that the medical report Defendants rely on merely notes that Allgood was then suffering from emphysema, but it does not reflect that Allgood was, in fact, informed of that diagnosis. (Plaintiffs' Response to Defendants R. J. Reynolds Tobacco Company's and the American Tobacco Company's Motion for Summary Judgment, p. 12) [hereinafter "Plaintiffs' Response"]. However, this argument is defeated by the affidavit of Dr. Bruce D. Kenamore. His statement was filed, for the first time, in support of Defendants' reply to Plaintiffs' response.[3] Dr. Kenamore is the

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[3] It should be noted that Plaintiffs argued initially that Dr. Kenamore's affidavit was not timely under Rule 56(c) of the Federal Rules of Civil Procedure and, therefore, should not be considered by the

Medical Director for Amoco Oil, and, at the relevant time, he was the "plant doctor" at the facility in Texas City. (Reply Memorandum in Support of Defendants R. J. Reynolds Tobacco Company's and the American Tobacco Company's Motion for Summary Judgment, Exhibit C, p. 1) [hereinafter "Defendants' Reply Memorandum"]. He was charged with the responsibility to conduct employee physical examinations. (Defendants' Reply Memorandum, Exhibit C, p. 2).

In his affidavit, Dr. Kenamore states that on January 8, 1985, Allgood reported to his office for an annual physical examination. (Defendants' Reply Memorandum, Exhibit C, p. 2). At that time, Dr. Kenamore noted that Allgood exhibited symptoms of emphysema and he advised him to quit smoking. (Defendants' Reply Memorandum, Exhibit C, p. 2). Dr. Kenamore further states that on February 20, 1986, Allgood reported to his office, once again, for an annual examination. (Defendants' Reply Memorandum, Exhibit C, p. 3). Dr. Kenamore has sworn that during that examination he "confirmed" his prior diagnosis of emphysema and informed Allgood of his condition. (Defendants' Reply Memorandum, Exhibit C, p. 2). He also confirms, as reflected in the medical record at issue, that he advised Allgood that his emphysema was related to his smoking and requested, "again", that he quit smoking. (Defendants" Reply Memorandum, Exhibit C, p. 2).

In response to Defendants' Reply Memorandum, and that exhibit, Plaintiffs did not offer any admissible evidence that rebuts or refutes Dr. Kenamore's affidavit. Plaintiffs did file a pleading styled "Declaration of Alden D. Holford" on April 11, 1994. Attached to that is a purported excerpt from a deposition that was given by Sam Allgood in May of 1986 in

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Court. Plaintiffs never requested any additional time to respond to this evidence and have apparently abandoned that objection.

connection with a workers compensation claim. In response to the question "[Did] He [Dr. Kenamore] tell you why you should quit smoking?", Allgood testified that Dr. Kenamore told him that if he did not quit smoking he would "probably wind up with emphysema or something". (Declaration of Alden D. Holford, Exhibit A, p. 28). Plaintiffs argue that this testimony is sufficient to raise a genuine issue of material fact as to whether Allgood knew that he had developed health problems, as a result of smoking, prior to February 16, 1987. Defendants contend that this excerpt is not competent summary judgment evidence and should not be considered because the deposition was taken long before this suit was filed; they were not present during the questioning; and they have had no opportunity to cross-examine Allgood on his responses.

Rule 32 (a) of the Federal Rules of Civil Procedure provides that a deposition may be used "against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof." Fed. R. Civ. P. 32(a). The Fifth Circuit has recognized that Rule 32 (a) was intended to ensure "fairness" by "requiring that the opposing party have the right or opportunity to be present at the deposition." Bobb v. Modern Products, Inc., 648 F.2d 1051, 1055 (5th Cir. Unit B 1981). In this circuit, courts consistently decline to allow a deposition "taken in another case" to serve as "evidentiary material" in a subsequent action against different parties. Houston North Hospital Properties v. Telco Leasing, Inc., 688 F.2d 408, 410 (5th Cir. 1982). In fact, the Fifth Circuit has held that it is "quite proper" to refuse to admit a deposition where the opposing party "never had the opportunity of cross examination", even if the deponent has since died. Empire Seafoods, Inc. v. Anderson, 398 F.2d 204, 218 n.7 (5th Cir. 1968). In light of the foregoing, the Court finds that Allgood's deposition excerpt is not competent summary judgment evidence and cannot be used in an attempt to defeat Defendants' motion.

In light of Davenport and the other cases discussed, the Court must conclude that Plaintiff's wrongful death and survival actions for negligence, conspiracy, and strict liability/design defect accrued no later than February 1986 and, as such, were time barred at the time of Allgood's death. Accordingly, Defendants are entitled to summary judgment on those claims.

2. Claims for Breach of Warranty

The law generally recognizes two kinds of warranties: those that are express and those that are implied. "Implied warranties relate to the condition, kind, characteristics, suitability, etc. of sold goods at the time of sale. Safeway Stores, Inc. v. Certainteed Corp., 710 S.W.2d 544, 546 (Tex. 1986). "An express warranty is created when a seller makes an affirmation of fact or a promise to the buyer which relates to the products or goods sold and warrants a conformity to the affirmation or promise." Lulan v. Tampo Manufacturing Co., Inc., 825 S.W.2d 505, 511 (Tex. App.--El Paso 1992, no writ).

In Texas, claims for breach of warranty are subject to the four year statute of limitations that is set out in Section 2.725 of the Texas Business and Commerce Code. A cause of action based on an implied warranty accrues upon the product's delivery and the limitation period "runs from the date of sale." Safeway, 710 S.W.2d at 546. The limitations period on an express warranty claim, however, may be extended beyond four years in some limited circumstances. As § 2.725 details, "where a warranty explicitly extends to future performance of the goods . . . the cause of action accrues when the breach is or should have been discovered." Tex. Bus. & Com. Code Ann. § 2.725. This "future performance" exception, as it has been termed, allows an individual to bring an action for breach of an express warranty more than four years after the purchase, if the product's future performance is the subject of an express warranty. Safeway, 710 S.W.2d

at 546. In other words, to satisfy the "future performance" exception, the warranty itself must extend "explicitly" to the future performance of that product. Safeway, 710 S.W.2d at 546. In Texas, a warranty "must make specific reference to a specific date in the future" to comply with the "future performance" exception. Safeway, 710 S.W.2d at 548.

Reynolds argues that Plaintiffs' breach of warranty claims against it are barred by the statute of limitations. Reynolds contends that any action based on a breach of implied warranty accrued "sometime in 1960", at the latest, as Plaintiffs admit that Allgood never smoked cigarettes that were manufactured by Reynolds after 1956. (Plaintiff's Third Amended Complaint, paragraph 2). Reynolds further claims that Plaintiffs cannot meet the "future performance" exception as to its products, and, therefore, any claims based on a breach of express warranty are, likewise, barred. American also contends that Plaintiffs' breach of warranty claims against it are barred on the same grounds. American does concede, however, that Allgood purchased cigarettes that were manufactured by American during a six week period from January 4, 1987, to February 16, 1987. If so, those purchases fall within the applicable four year limitations period. American argues, however, that to the extent that any of Plaintiffs' breach of warranty claims are not time-barred, the action still must fail in light of the Texas Supreme Court holding in Joseph E. Seagram & Sons v. McGuire, 814 S.W.2d 385, 387 (Tex. 1991).[4] CTR and TI maintain that there can be no breach of warranty action against them because they do not manufacture, market, or sell cigarettes.

To counter these arguments, Plaintiffs contend that their breach of warranty actions are based on the express claims

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[4] Discussion of the McGuire case is detailed separately.

made in the "Frank Statement" and other advertisements that Defendants published in the course of their "conspiracy." Plaintiffs contend that those advertisements contain promises of future performance that are sufficient to satisfy the express warranty exception and, thereby, toll the statute of limitations. Plaintiffs argue that although TI and CTR do not manufacture or sell cigarettes, they should be held responsible for their part in the "conspiracy" to publish and distribute those advertisements.

The Court finds Plaintiffs' arguments without merit. Plaintiffs claims are based entirely on the "Frank Statement" and on certain advertisements published by American. The "Frank Statement" was published on January 4, 1954, in several daily newspapers, including two papers that Plaintiffs contend Allgood was known to read, The Miami Herald and The Miami Daily News. That statement proposed to dispel fears that smoking cigarettes created a health risk and, to that end, stated that no proof existed to show that smoking was a cause of lung cancer. Plaintiffs claim that this article contained an express warranty about the future performance of cigarettes and that the warranty influenced Allgood to continue smoking. Plaintiffs have also presented the Court with several advertisements that were published by American between 1951 and 1961. Plaintiffs contend that those advertisements, likewise, extended to the future performance of cigarettes through claims that their cigarettes are "mild" and "guard against throat scratch".

A review of those publications reveals that they do not contain even a remote reference to a specific date in the future. Because Texas "courts construe the [future performance] exception narrowly, "with the emphasis on the term 'explicitly'", the Court must conclude that the advertisements relied on here do not satisfy the "future performance" exception. Safeway, 710 S.W.2d at 548 (citation omitted). In fact, other jurisdictions have held those same advertisements insufficient to constitute promises of future performance. See

Gunsalus v. Celotex Corp., 674 F. Supp. 1149, 1155 (E.D. Pa. 1987) (holding that the American advertisements promised "smoker satisfaction that could be evaluated by the user immediately", but did not "constitute express warranties of future performance as a matter of law"). For the foregoing reasons, the Court finds that Plaintiffs have failed to show that the "express warranty" exception to the statute of limitations applies in this instance. Plaintiffs' claims for breaches of express and implied warranties are, therefore, both governed by the four year statute of limitations.

Plaintiffs' claims against TI and CTR must fail. Claims for breach of express and implied warranties can be brought only against one who is considered to be a "seller" of goods. See, Tex. Bus. & Com. Code Ann. §§ 2.103(a)(4), 2.313(a), 2.314(a); Charles E. Beard, Inc. v. Cameronics Tech. Corp., LTD., 729 F. Supp. 528, 530 (5th Cir. 1989). The Texas Business and Commerce Code defines "seller" as "a person who sells or contracts to sell goods." Tex Bus. & Com. Code Ann. § 2.103(a)(4). Here, it is clear that, unlike American and Reynolds, neither TI nor CTR is a seller of goods as defined by Texas law. They cannot, therefore, be held liable for breaches of warranty as a matter of law. Charles E. Beard, Inc., 729 F. Supp. at 530.

B. Claims for Fraud

Plaintiffs' Third Amended Complaint (Docket Entry #66) raises various fraud allegations in ¶7. That paragraph makes reference to ¶5, ¶6, and ¶9 of the Complaint as well. For the sake of completeness, the allegations can be summarized as follows: From about 1942 on, Defendants had "credible scientific evidence" that linked cigarette smoking to a number of diseases, including lung cancer; at about the same time, Defendants had knowledge that "several credible scientific studies" had concluded that nicotine was "responsible for ... compulsive" smoking; that American cigarette manufacturers, including the named Defendants, have intention-

ally engaged in efforts to suppress scientific research on the connection between smoking and health; that they have used similar efforts to contradict published reports that do link smoking to disease; that they have attempted to mislead the public about whether the scientific community is divided on the effects of smoking. Central to this effort, Defendant CTR's predecessor allegedly published "A Frank Statement to Cigarette Smokers" in 1954. This statement was intended to hide, from the public, scientific reports that established a causal connection between cigarette smoking and disease. Plaintiffs allege more specifically that Defendants, knowing that cigarette smoking was addictive and injurious, made contrary "material misrepresentations" to the general public, including Sam Allgood. The alleged purpose of these "misrepresenta-tions" was to mislead the public and to promote continued smoking. Plaintiffs contend that Sam Allgood relied on these misrepresentations "in beginning and continuing to smoke cigarettes." Plaintiffs also allege that Defendants, although they knew that cigarette smoking was addictive and that the public, including Sam Allgood, was unaware and unable "to discover" this, concealed such information from the public intentionally. Such purported concealment was, again, intended to promote smoking in ignorance of the true scientific data and that Sam Allgood did, in fact, continue to smoke because of Defendants' actions. (All quoted references are to Plaintiffs' Third Amended Complaint, pp. 4-6).

In cases governed by the Federal Rules of Civil Procedure, allegations of fraud must meet the dictates of Rule 9(b). While permitting allegations that concern knowledge, or other mental conditions, to be raised generally, Rule 9(b) nevertheless requires a claimant to plead those specific events which he contends gives rise to an inference of knowledge.

> Under Federal Rule of Procedure 9(b), fraud is a 'special matter', and the circumstances constituting

> fraud must be stated with particularity. At a minimum, this requires that the plaintiff allege the time, place, and contents of the alleged misrepresentation, as well as the identity of the person making them.

Keith v. Stoelting, Inc., 915 F.2d 996, 1000 (5th Cir. 1990). See also Tel-Phonic Services, Inc. v. TBS International, Inc., 975 F.2d 1134, 1138-39 (5th Cir. 1992).[5]

Under Texas law, a cause of action for fraud is "generally considered to accrue either when the fraud is discovered or when the facts giving rise to the fraud claim are discovered or might reasonably be discovered through reasonable diligence---the so called 'discovery rule.'" Kansa Reinsurance v. Congressional Mortgage Corporation of Texas, 20 F.3d 1362, 1369 (5th Cir. 1994) (citations omitted). A claim for fraud is subject to a statute of limitations of four years from the date on which it accrues. Kansa Reinsurance, 20 F.3d at 1369; Williams v. Khalaf, 802 S.W.2d 651, 657-58 (Tex. 1990). Sam Allgood's fraud claims were, arguably, within the appropriate statute of limitations at the time of his death.

1. MISREPRESENTATIONS

To defeat summary judgment, Plaintiffs must raise genuine issues of material fact on each of the following elements of fraud:

(1) that a material representation was made;

(2) that it was false;

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[5] There is serious question about whether Plaintiffs' allegations, as set out in the third amended complaint, are sufficient. However, Defendants have not directed an argument to the sufficiency of the pleadings, and instead have argued that Plaintiffs have failed to raise a genuine issue of material fact on each of the elements necessary to sustain a fraud claim.

(3) that when the speaker made the material representation, he knew it was false or he made it recklessly without any knowledge of its truth, and as a positive assertion;

(4) that he made it with the intention that it should be acted upon by the parties;

(5) that the party acted in reliance upon it; and,

(6) that he thereby suffered injury.

Trenholm v. Ratcliff, 646 S.W.2d 927, 930 (Tex. 1983); DeSantis v. Wackenhut Corp., 793 S.W.2d 670, 688 (Tex. 1990), cert. denied, 498 U.S. 1048, 111 S.Ct. 755, 112 L.Ed.2d 775 (1991). Plaintiffs also bear the burden to demonstrate that the claimant's conduct was in justifiable reliance on the disputed representation. "To succeed in a common law fraud action, a plaintiff's reliance on the defendant's fraudulent conduct must be justifiable as well as actual." Haralson v. E. F. Hutton Group, Inc., 919 F.2d 1014, 1025 (5th Cir. 1990) (citations omitted). See also Beijing Metals & Minerals Import/Export Corporation v. American Business Center Inc., 993 F.2d 1178, 1185 (5th Cir. 1993); Roberts v. United New Mexico Bank at Roswell 14 F.3d 1076, 1078 (5th Cir. 1994).

Apparently, Plaintiffs contend that two sentences from the previously identified "Frank Statement" constitute material representations, by Defendant CTR's predecessor to Sam Allgood, and that the statements were false when made. These two sentences were among the other phrases in the advertisement that appeared in the "Miami Herald" and the "Miami Daily News" on January 4, 1954. (Appendix C, Answer to 2A(1), Memorandum of Law in Support of Defendants The Council For Tobacco Research-U.S.A., Inc.'s Motion for Summary Judgment) [hereinafter "CTR's" Memorandum]. The two sentences upon which this aspect of Plaintiffs' fraud claims rests, are set out below:

> We accept an interest in people's health as a basic responsibility, paramount to every other consideration in our business . . .
>
> We always have and always will cooperate closely with those whose task it is to safeguard the public health.

(Appendix C, Answer 17A(5), CTR's Memorandum).

Although Plaintiffs cite these statements as the inducement for Sam Allgood's continued smoking, following its publication, the record does not contain any evidence that he actually did rely on them. Plaintiffs do provide allusions to Sam Allgood's interest in current affairs and his reported habit of reading daily newspapers. There is also evidence that he spent time in Florida, compliments of the U. S. Navy, at the time the advertisement was published. Plaintiffs may have been hoping that Charles Holleman, Sam Allgood's former shipmate, would provide proof that the deceased saw, read, and relied on the Frank Statement. Mr. Holleman's deposition testimony, however, defeats that hope. (Appendix I, p. 13, 22-27, 31-32, 37, 52-54, 62, 88, 106, 109-110, 125, CTR's Memorandum.) Mr. Henry Brumfield, another colleague of Sam Allgood's, also failed to corroborate Plaintiffs' assertion that the deceased read, and relied on, the advertisement. In fact, Mr. Brumfield testified that, to his knowledge, Sam Allgood did not begin to smoke or continue to smoke in reliance on anything that may have been published in a newspaper ad. (Exhibit T, pp. 25, 192-93, Defendants' Memorandum of Law).

Plaintiffs have shown no credible evidence sufficient to defeat Defendants' motion for summary judgment, that Sam Allgood ever smoked cigarettes in actual reliance on the sentences published in 1954. "Unsubstantiated assertions are not competent summary judgment evidence." Forsyth v. Barr, 19 F.3d 1527, 1533 (5th Cir. 1994). A non-movant cannot hope to defeat a valid motion for summary judgment

by presenting "conclusory allegations, improbable inferences and unsupported speculation." Krim v. BancTexas Group, Inc., 989 F.2d 1435, 1449 (5th Cir. 1993) (citing International Shortstop, Inc. v. Rally's Inc., 939 F.2d 1257, 1266 (5th Cir. 1991)). Without some evidence on this element of fraud, Defendants are entitled to summary judgment as to any allegation based on the Frank Statement.

Plaintiffs' claims concerning other material representations upon which Mr. Allgood purportedly relied, must fail as well. For these purposes, the Court accepts the contention that numerous other, equally "misleading" publications and advertisements by the Defendant manufacturers and/or industry groups form the basis for Plaintiffs' fraud claims.[6] These publications were, in Plaintiffs' estimation, all directed toward convincing the public, and Sam Allgood in particular, that smoking was not dangerous or harmful. Plaintiffs argue, therefore, that Allgood smoked "in reliance" upon these false and misleading statements. In response, Defendants' have outlined, from the record, the following details in regard to Sam Allgood's conduct as a smoker:

1. Sam Allgood was known to use cigarettes at a very early age (whether it was at age 6 or at age 12) and he smoked continuously from about 1941 on. He smoked for almost 50 years and did not stop smoking until the laryngeal cancer was diagnosed in

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[6] Appendix C, 2B, CTR's Memorandum, details a list of publications in a slew of periodicals and journals that Plaintiffs claim Sam Allgood "read, or saw or he knew, about". Unfortunately, the Court cannot discern any valid support for this contention in the record. Therefore, those publications do not permit further individual discussion. Even the skeletal assertion concerning the deceased's familiarity with the Frank Statement is lacking as to these. In addition, it does not appear that the majority of the articles were authored by, sponsored by, or linked in any specific way by the evidence, to the Defendants. However, in an abundance of caution, they will be assessed in light of the applicable Texas law.

1987. (Defendants' Memorandum of Law).

2. Mr. Allgood's father, and other family members, advised him repeatedly that smoking was detrimental to his health and that it was not in "his best interests". (Deposition of Luther Bernard Allgood, p. 12, Exhibit A to Defendants' Memorandum of Law); (Deposition of Nora Lillian Allgood, pp. 111-112, Exhibit B to Defendants' Memorandum of Law).

3. In the 1950's, when Sam Allgood's father was diagnosed as suffering from lung cancer, family members openly attributed the disease to the father's habit of smoking cigarettes. (Deposition of Nora Lillian Allgood, pp. 115-118, Exhibit B to Defendants' Memorandum of Law).

4. Throughout his life, Mr. Allgood not only received other, repeated warnings of the health risks associated with continued smoking, but he is reported to have read, and understood, the printed warnings on cigarette packages that were required by law after January 1966. (Auld-Caskey Deposition, pp. 33-40, Exhibit C to Defendants' Memorandum of Law); (Crainer Deposition, pp. 27, 31, 34, Exhibit D to Defendants' Memorandum of Law); (Hudson Deposition, pp. 23-24, Exhibit E to Defendants' Memorandum of Law); (Taylor Deposition, pp. 21-22, Exhibit I to Defendants' Memorandum of Law).

5. The decedent himself would refer to cigarettes as "coffin nails" and/or "cancer sticks". Sam Allgood's wife, Plaintiff Bonnie Allgood, is reported to have used these same terms in his presence and, indeed, warned that smoking was going to "kill him". (Hudson Deposition, pp. 17, 18, 21, Exhibit E to Defendants' Memorandum of Law); (Auld-Caskey Deposition, pp. 38-39, 69-70, Exhibit C to Defendants' Memorandum of Law); (Purcell Deposition,

pp. 25-26, 31-34, 40, 42, 80, Exhibit G to Defendants' Memorandum of Law); (Crainer Deposition, pp. 29, 34, Exhibit D to Defendants' Memorandum of Law); (Patty Deposition, pp. 13-14, 16, Exhibit K to Defendants' Memorandum of Law).

6. Dr. John Grabowski, one of Plaintiffs' expert witnesses, testified that warnings of health risks associated with cigarettes would have been irrelevant to Sam Allgood's habits. He stated, specifically, "I would imagine that [Mr. Allgood] would have started smoking independent of the labeling." (Grabowski Deposition, pp. 327-330, 408-423, 330, Exhibit P to Defendants' Memorandum of Law). Plaintiff Bonnie Allgood testified, similarly, that no warning would have been sufficient to" deter her --husband from smoking. (Bonnie Allgood Deposition, p. 229, Exhibit 0 to Defendants' Memorandum of Law).

7. Sam Allgood's stepmother, Nora Lillian Allgood, testified that it would be "ridiculous" to say that he began smoking because of advertising. (Deposition, Nora Lillian Allgood, p. 137, Exhibit B to Defendants' Memorandum of Law).

Based upon all of the evidence, Plaintiffs' claims must fail. Statements in the record from Sam Allgood's family members, his colleagues, his health care providers, and his own colloquial references to cigarettes, all refute a claim that his smoking was induced, or prolonged, because of representations made by the tobacco industry or cigarette manufacturers about the safety of smoking. This is so without regard to whether such advertisements are deemed "misrepresentations". The Court, in reaching this conclusion, recognizes Plaintiffs' argument that Sam Allgood was "addicted" to cigarettes in his youth and had no control over his smoking habits thereafter. The Court also appreciates the extension of

this argument that the "addiction" resulted from the Defendants' allegedly fraudulent acts. However, the record, in this case, lacks credible evidence on the threshold elements of Plaintiffs' theory of recovery. Leaving aside the problem of identifying the particular statement, the maker and the time and place when made, the evidence contradicts any assertion of reliance on the part of the deceased. In the absence of such reliance, there is no fraud. Accordingly, Plaintiffs have failed to meet the burden established under Texas law and Defendants are entitled to summary judgment on this aspect of Plaintiffs' claim.

2. "FRAUDULENT CONCEALMENT"

Defendants have also moved for summary judgment on claims for "fraudulent concealment". Plaintiffs have made several allegations about Defendants' conduct in failing to disclose information about the injurious effects of smoking. These assertions stress Defendants' attempts to "suppress research" and to "hide from the public" the results of the scientific tests---tests that Defendants sponsored---which established causal connections between smoking and deadly disease. Although Defendants appear to respond to these allegations as an independent cause of action, they are more appropriately addressed as another aspect of a fraud claim under Texas law.

As noted, a plaintiff in a Texas fraud action must plead and prove reliance on a false representation. A defendant's silence, however, may be the equivalent of a false representation if particular circumstances are present which would impose a duty to speak, and yet the defendant was silent or concealed pertinent facts. Spoljaric v. Percival Tours, Inc., 708 S.W.2d 432, 435 (Tex. 1986) (citations omitted). In those circumstances, the concealment is held to be merely a different mode of expression for a material misrepresentation. Long v. Martin, 234 S.W. 91 (Tex. Civ. App.-Amarillo 1921, er. dism'd, w.o.j.). However, one who is not legally

obligated to provide information will not be held to have committed fraud by a failure to volunteer it. Defendants cannot be liable for any fraudulent concealment in the absence of a duty, under the law, to disclose the disputed information.

Plaintiffs must prove, therefore, that Sam Allgood's conduct in continuing to smoke was due to Defendants' allegedly fraudulent acts in concealing damaging scientific conclusions. The evidence, however, is to the contrary. Plaintiffs are unable to show that Allgood smoked in ignorant reliance on Defendants' purported suppression of adverse medical information. This is particularly so in view of deposition testimony that Sam Allgood, although aware of the health risks, persisted in smoking and would have smoked anyway, even had he been armed with further, or different, information on potential disease or other serious consequence.

More importantly, and even more damaging to the pending claim of "concealment," Plaintiffs have failed to establish the requisite relationship that would give rise to a legal duty, on the part of the Defendants, to divulge contrary scientific or medical information. "[T]he failure to disclose information is not and cannot be common law fraud in Texas in the absence of a fiduciary relationship between the parties." Crawford Painting & Drywall Co. v. J. W. Bateson Co., 857 F.2d 981, 985 (5th Cir. 1988) cert. denied, 488 U.S. 1035, 109 S.Ct. 850, 102 L.Ed.2d 982 (1989) ; Tempo Tamers, Inc. v. Crow-Houston Four, Ltd., 715 S.W.2d 658, 669 (Tex. Civ. App.-Dallas 1986, writ ref'd n.r.e.).

> A fiduciary relationship exists where the parties are under a duty to act for or give advice for the benefit of another upon matters within the scope of the relationship.

American Medical Int'l. v. Guirintano, 821 S.W.2d 331, 339 (Tex. Civ. App.-Houston (14th Dist. 1991, no writ).

It is also significant that a fiduciary relationship is held to be "an extraordinary one and will not be lightly created; the mere fact that one subjectively trusts another does not, alone, indicate that he placed confidence in another in the sense demanded by fiduciary relationships, because something apart from the transaction between the parties is required. American Medical, 821 S.W.2d at 339. The Allgood plaintiffs have presented no evidence of the requisite relationship between the deceased and Defendants that would establish a duty to disclose damaging information about smoking. In the absence of a fiduciary relationship, there is no duty to disclose information and, therefore, no fraud.

On a review of the record, and subject to the established law in Texas on fraud and fraudulent concealment, the Court has determined that Plaintiffs' claims must fail. Whether Sam Allgood smoked because he was "addicted" or because his stepmother doled out cigarettes to him when he was in his early teens (Grabowski Deposition, p. 416, Exhibit P to Defendants' Memorandum of Law) or because "he enjoyed it" (Taylor Deposition, p. 22; Auld-Caskey Deposition, p. 45, Exhibits I and C to Defendants' Memorandum of Law) is beside the point. Each of these can be debated as reasonable theories for his conduct. What is beyond dispute, however, is the absence of testimony, or any other support in the record, sufficient to raise a genuine issue of material fact that a fiduciary relationship existed between the deceased and Defendants and/or that Sam Allgood began or continued smoking in justifiable reliance on statements made by Defendants and that he was injured as a result. Defendants, therefore, are entitled to summary judgment on all of the fraud claims.

C. Defendants' Alternative Argument

Finally, Defendants argue that even if Plaintiffs' claims are not barred, they still must fail, in their entirety, under the rule of law stated in Joseph E. Seagram & Sons v. McGuire, 814 S.W.2d 385, 387 (Tex. 1991). In McGuire, the plaintiffs

alleged that the defendant had failed to warn of the dangers of alcohol and the effects of long-term drinking. The plaintiffs charged that alcohol manufacturers advertised and promoted their products in a way that created a false illusion that drinking was safe and that the manufacturers had conspired to conceal from the public adverse information about the effects of alcohol. Those plaintiffs sought recovery for fraud, conspiracy, products liability, negligence and breach of warranty. The claims lodged by the McGuire plaintiffs are identical to the ones alleged here.

The Texas Supreme Court rejected all of the plaintiffs' claims, holding that where the dangers of a product in the mainstream of commerce are "generally known and recognized" such a lawsuit cannot succeed. McGuire, 814 S.W.2d at 387-388. In reaching this conclusion, the Texas Supreme Court relied heavily on three factors. First, the court determined that all of the plaintiffs' claims were, in essence, based on "Seagram's alleged duty to warn or instruct of the danger of developing the disease of alcoholism from prolonged and excessive consumption of alcoholic beverages." McGuire, 814 S.W.2d at 387. Second, the court found that under Comments i and j to Section 402A of the Restatement (Second) of Torts, there is no duty to warn of dangers that are generally known and recognized. McGuire, 814 S.W.2d at 387. The court placed great emphasis on the fact that alcohol is listed as a specific example of such a product in the Comments to the Restatement. McGuire, 814 S.W.2d at 387 n.4. Finally, the court noted the fact that other Texas decisions had recognized that the dangers of alcohol are common public knowledge. McGuire, 814 S.W.2d at 388.

Defendants contend that the McGuire analysis applies with equal vigor to the case at hand. Defendants claim that the dangers of cigarettes, like the dangers of alcohol, are generally known and recognized by the public. Further, Defendants argue that tobacco, like alcohol, is mentioned expressly in Comments i and j to Section 402A of the

Restatement (Second) of Torts as one of the very products for which there is no duty to warn. Finally, Defendants stress that Plaintiffs' claims here are based entirely on the contention that Defendants should have warned them of the dangers associated with smoking.

At the outset, the Court notes that there are no Texas cases addressing the precise issue raised here. Because this case presents an issue which is "not clearly controlled" by existing state law, the Court must attempt to determine how the Texas Supreme Court would likely decide the issue. Coatings Manufacturers, Inc. v. DPI, Inc., 926 F.2d 474, 476 (5th Cir. 1991). In making this determination, it is helpful to look to Fifth Circuit decisions, as well as those from other jurisdictions. Coatings Manufacturers, 926 F.2d at 476.

Texas has adopted § 402A of the Restatement of Torts. *Way v. Boy Scouts of America*, 856 S.W.2d 230, 238 (Tex. App.-Dallas 1993, writ denied), *citing*, McKisson v. Sales Affiliates, Inc., 416 S.W.2d 787, 789 (Tex. 1967). The Fifth Circuit has recognized that, under § 402A of the Restatement, "cigarettes are not unreasonably dangerous as a matter of law because 'knowledge that cigarette smoking is harmful to health is widespread and can be considered part of the common knowledge of the community.'" Pennington v. Vistron Corp., 876 F.2d 414, 424 (5th Cir. 1989) (*quoting*, Rovsdon v. R. J. Reynolds Tobacco Co., 849 F.2d 230, 236 (6th Cir. 1988)). (The Court in Pennington declined to follow that precedent, however, noting that Louisiana law is substantially broader than the Restatement.) Other jurisdictions have also recognized that the dangers of smoking are generally known and, therefore, do not generate a "duty to warn". See Austin v. State of Tennessee, 179 U.S. 343, 348 (1938); Paugh v. R. J. Reynolds Tobacco Co., 834 F. Supp. 228 (N.D. Ohio 1993); Johnson v. R. J. Reynolds Tobacco Co., No. 86-1343 (S.D. Tex. December 5, 1986). Further, it is significant to note that, although McGuire was limited to its facts, Texas courts have applied its analysis to reach similar

conclusions in other cases. Salinas v. General Motors Corp., 857 S.W.2d 944 (Tex. App.--Houston [1st Dist.] 1993, no writ) (applying McGuire to hold that car manufacturer had no duty to warn elderly driver about dangers of driving); Schmidt v. Centex Beverage, Inc., 825 S.W.2d 791 (Tex. App.--Austin 1992, no writ) (holding, in light of McGuire, that wholesale beer distributors have no duty to warn of the dangers of alcohol consumption).

On a review of the record, the Court has determined that the claims presented here, like those in McGuire, are based on the theory that Defendants owed Allgood a duty to warn of the dangers of smoking cigarettes. The Court concludes, therefore, that the Texas Supreme Court would follow McGuire and § 402A of the Restatement in deciding this action. For that reason, each remaining claim must fail. Accordingly, Defendants are entitled to summary judgment on all of Plaintiffs' claims.

IV. Conclusion

For all of the foregoing reasons, it is

RECOMMENDED that the Defendants' motions for summary judgment be GRANTED.

The Clerk of the Court shall send copies of this Memorandum and Recommendation to the respective parties who will then have ten (10) days from the receipt of it to file written objections thereto, pursuant to 28 U.S.C. § 636(b)(1) (C), General Order 80-5, S.D. Texas. Failure to file written objections within the time period provided shall bar an aggrieved party from attacking the factual findings on appeal.

The original of any written objections shall be filed with the United States District Clerk, P.O. Box 61010, Houston, Texas 77208; copies of any such objections shall be delivered to the chambers of Judge Vanessa D. Gilmore, Room 10026, and to the chambers of the undersigned, Room 7007.

SIGNED at Houston, Texas, this 7th day of November, 1994.

/S/ Mary Milloy
MARY MILLOY
UNITED STATES MAGISTRATE JUDGE

STATUTORY PROVISIONS

FEDERAL RULES OF CIVIL PROCEDURE
RULE 6. TIME

(d) For Motions—Affidavits. A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in Rule 59(c), opposing affidavits may be served not later than 1 day before the hearing, unless the court permits them to be served at some other time.

RULE 8. GENERAL RULES OF PLEADING

(c) Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

RULE 56. SUMMARY JUDGMENT

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The Adverse party prior to the day of hearing may serve opposing affidavits. The judgment should shall be rendered forthwith if the pleadings, depositions, answers to

interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse part's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

* * *

FEDERAL RULES OF CIVIL EVIDENCE
ARTICLE VIII. HEARSAY
RULE 801. DEFINITIONS

(2) ***Admission By Party-Opponent.*** The statement is offered against a party and is (A) the party's own statement in either an individual or a representative capacity ... or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter with the scope

of the agency or employment, made during the existence of the relationship ... .

* * *

TEXAS BUSINESS AND COMMERCE CODE

§ 2.103. Definitions and Index of Definitions

(a) In this chapter unless the context otherwise requires ...

(4) "Seller" means a person who sells or contracts to sell goods.

§ 2.725. Statute of Limitations in Contracts for Sale

(b) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.

SYNOPSIS OF SUMMARY JUDGMENT RECORD FILINGS AND NUMBERING

Defendants' motions for summary judgment and subsequent relevant filings are identified by District Court document numbers (number in parenthesis) and Record pages [numbers in brackets].

1. Defendants' motions for summary judgment:

a. CTR's motion (121) [3379-3375], (122) [3478-3380]; Plaintiffs' response (130) [4047-3528]; CTR's reply (142) [4230-4210]; CTR's supplemental memo (146) [4284-4248]; Plaintiffs' reply (147) [4329-4285]; Plaintiffs' further declaration (Pollay) (210) [1496-983].

b. RJR's motion—partial (125) [3489-3487], (126) [3521-3490]; Plaintiffs' response (134) [4142-4072]; Plaintiffs' supplemental response (135) [4145-4143]; RJR's reply (139) [4203-4187]; Plaintiffs' rejoinder (141) [4209-4207].

c. AT's motion—S/L-survival claims (128) [3527-3524]; Plaintiffs' response (130) [4047-3528]; AT's reply (145) [4247-4243].

d. TI's motion—S/L-survival claims (138) [4186-4184]; Plaintiffs' response (144) [4242-4241].

e. RJR's summary including a new case (173) [4568-4558]; Plaintiffs' response (174) [4569].

f. RJR's and AT's motion (189) [4631-4628], (190) [420-001]; Plaintiffs' response (203) [4988-4778]; Holford's supplemental affidavit (207) [5005-4999]; Mrs. Allgood's Affidavit (211) [5106-5103]; RJR's and AT's reply (209) [5101-5009] (*attaches Kenamore affidavit* [5037-5025] *improperly filed day before hearing*); Holford's declaration (212) [5124-5107]; RJR's and AT's supplemental memorandum (219) [5173-5159]; Plaintiffs' response (220) [5175-5174].

g. TI's motion (192) [4640-4638], (193) [4691-4641]; Plaintiffs' response (204) [982-421]; TI's supplemental memorandum (208) [5008-5006].

Supreme Court, U.S.
FILED
SEP 13 1996
CLERK

No. 96-248

IN THE

Supreme Court of the United States

October Term, 1996

MRS. SAMUEL E. ALLGOOD, individually and as independent executrix of the estate of SAMUEL E. ALLGOOD, MARCUS ALLGOOD and MALCOLM ALLGOOD,
Petitioners,

v.

R.J. REYNOLDS TOBACCO COMPANY, THE AMERICAN TOBACCO COMPANY, THE TOBACCO INSTITUTE, INC. and THE COUNCIL FOR TOBACCO RESEARCH-U.S.A., INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the courts below correctly held that certain of petitioners' state-law product liability claims were time-barred.

2. Whether the courts below correctly held that there was insufficient evidence to support a finding that petitioners' decedent had relied on statements or omissions allegedly made by respondents.

3. Whether the courts below correctly applied the Texas-law bar to product liability claims based on statements or omissions about a product's commonly known risks.

PARTIES TO THE PROCEEDINGS

Petitioner R.J. Reynolds Tobacco Company ("Reynolds") is wholly owned by RJR Nabisco Inc., which, in turn, is wholly owned by RJR Nabisco Holdings Corporation. Reynolds has the following partly owned subsidiaries: AO ISMA; AO3T Kabisco; AO Vostanovienniy Tabak; China-American Cigarette Company Ltd.; Modi RJR Ltd.; R.J. Reynolds-Da Nang Tobacco Co. Ltd.; R.J. Reynolds/M.C. Tobacco Co. Ltd.; R.J. Reynolds Tobacco-Kazakhstan; R.J. Reynolds Tobacco - Kremenchuk; R.J. Reynolds Tobacco - Lviv JSC; Reynolds Manufacturing (Bulgaria) Ltd.; Reynolds Manufacturing (Romania) SRL; RJR-Armavirtabak; Sunrise Biosystems, Inc; Tanzanian Cigarette Co.; RJR-Petro; R.J. Reynolds Tobacco (U.K.) Ltd.; R.J. Reynolds Tobacco (Poland) Ltd.; R.J. Reynolds Berhad; R.J. Reynolds Espana, S.L.; and R.J. Reynolds (Portugal) Empresa Comercial de Tabacos Ltd.

Respondent The American Tobacco Company ("American") was merged into the Brown & Williamson Tobacco Corporation ("Brown & Williamson") on February 28, 1995. Brown & Williamson is a wholly owned subsidiary of BATUS Tobacco Services, Inc. Brown & William's ultimate corporate parent is B.A.T. Industries, P.L.C. Brown & Williamson has no subsidiaries that are not wholly owned.

Respondent The Tobacco Institute, Inc. ("TI") has no parent companies, subsidiaries or affiliates. TI's current members are R.J. Reynolds, Brown & Williamson, Consolidated Cigar Corporation, Conwood Company, L.P., General Cigar Company, Inc., John Middleton Incorporated, Liggett Group, Inc., Lorillard Tobacco Company, Philip Morris U.S.A., The Pinkerton Tobacco Company, Swisher International, Inc. (formerly Helme Tobacco), Tobacco Exporters International (USA) Ltd./ Lane Limited, and United States Tobacco Company.

Respondent The Counsel Tobacco Research - U.S.A., Inc. ("CTR") has no parent companies, subsidiaries or affiliates. CTR's current members are R.J. Reynolds, Brown & Williamson, Bright Belt Warehouse Association, Burley Auction Warehouse

Association, Burley Stabilization Corporation, Burley Tobacco Growers Cooperative Association, Lorillard Tobacco Company, Philip Morris Incorporated, Tobacco Associates, Inc., and United States Tobacco Company.

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STATEMENT OF THE CASE

Petitioners are the wife and sons of the late Samuel E. Allgood. Petitioners filed this products liability action in the United States District Court for the Southern District of Texas, contending that Mr. Allgood had suffered injuries from smoking cigarettes manufactured by respondents R.J. Reynolds Tobacco Company ("R.J. Reynolds") and The American Tobacco Company ("American"). Petitioners raised claims only under Texas law and asserted federal jurisdiction only on the basis of diversity. The District Court concluded that petitioners' claims failed on several alternative state-law grounds and therefore granted summary judgment to respondents. The Fifth Circuit affirmed.

The summary judgment record showed that Mr. Allgood was diagnosed with emphysema as early as January 1985. At that time, Mr. Allgood was told by his physician, Dr. Kenamore, to stop smoking. In February 1986, Dr. Kenamore confirmed the prior diagnosis of emphysema, told Mr. Allgood that his emphysema was smoking-related, and once again advised him to quit. (R. 5037-5025). Mr. Allgood did not, however, quit until a year later, when he was diagnosed with cancer of the larynx. Mr. Allgood subsequently died on January 23, 1989. (R. 5530, 2058-2057). This lawsuit was filed on January 4, 1991. (R. 5530).

After more than three years of discovery, respondents moved for summary judgment. Respondents maintained that the record evidence would not permit petitioners to try any of their claims under Texas law. (R. 420, 3478, 3521, 3527, 4186, 4691). An April 12, 1994 hearing was held on respondents' motions before Judge David Hittner. (R. Vol. 24). While the motions were pending, the case was transferred to Judge Vanessa Gilmore. A second summary judgment hearing was held, and the motions for summary judgment were argued before Magistrate Judge Mary Milloy on July 28, 1994. (R. Vol. 25). Judge Milloy subsequently recommended that respondents' motions be granted, and Judge Gilmore adopted Judge Milloy's recommendation and granted summary judgment. (R. 5753-5752). The Fifth Circuit affirmed. (Pet. App. 1a-9a).

REASONS FOR DENYING THE WRIT

This case presents no important federal question. The decisions of the court of appeals and district court largely were based upon Texas law. Both courts affirmed summary judgment on petitioners' strict liability, negligence, conspiracy, and breach of warranty claims based on the statute of limitations. Both courts affirmed summary judgment as to the fraud claims based on insufficient evidence of reliance. Alternatively, both courts affirmed summary judgment because Texas law does not permit claims based on a product's commonly known risks. Petitioners have failed to show any extraordinary circumstances or very obvious and exceptional error, so the findings of the two lower courts should not be disturbed, and the Petition should be denied. *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949); *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987).

I. THIS CASE PRESENTS NO SERIOUS PREEMPTION QUESTION

At the outset, petitioners briefly invite the Court to consider the extent to which the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331-1340, as construed in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), preempts state-law tort claims for fraudulent concealment. (Pet. 4-5). The Court of Appeals held that petitioners' claims were preempted "[t]o the extent that [they] are based on fraudulent concealment or a failure to warn after 1969." (Pet. App. 6a). Its decision in this regard clearly does not warrant further review.

To begin with, petitioners fail even to allege that the lower courts are divided on any question involving the preemption of fraudulent concealment claims. Indeed, petitioners neither cite nor discuss even a single lower-court preemption decision in any case other than this one. (Pet. 4-5, 21). In fact, the lower courts agree that the Labeling Act preempts fraudulent concealment claims based on statements that the defendant could have made through its advertising or promotion (15 U.S.C. § 1334(b)), but does not preempt fraudulent concealment claims based on

statements that the defendant could have made only through other channels of communication. *See, e.g., Cantley v. Lorillard Tobacco Co.*, No. 1950537, 1996 Ala. LEXIS 152, *10 (June 7, 1996); *cf. Sonnenreich v. Philip Morris Inc.*, 929 F. Supp. 416, 418-19 (S.D. Fla. 1996); *Griesenbeck v. American Tobacco Co.*, 897 F. Supp. 815, 822-23 (D.N.J. 1995). The decision below is completely consistent with these decisions, for petitioners in this case never alleged below, and do not even allege here, that Texas law required any disclosure through channels of communication other than "advertising or promotion." (Pet. 21-29).

Moreover, even if a preemption question did warrant the Court's review, this case presents an extraordinarily poor vehicle for addressing it. Regardless of what this Court might decide about preemption, the decisions below would still foreclose petitioners' fraudulent concealment claims on at least two independent state-law grounds: first, petitioners did not produce sufficient evidence to support a finding of reliance (Pet. App. 6a-7a), an essential element of fraud under Texas law, *e.g., Trenholm v. Ratcliff*, 646 S.W.2d 927, 930 (Tex. 1983); and second, because the risks of smoking are "common knowledge" within the meaning of *Joseph E. Seagram & Sons, Inc. v. McGuire*, 814 S.W.2d 385, 388 (Tex. 1991), Texas law does not permit product liability claims based on statements or omissions about those risks (Pet. App. 7a-8a). This Court should not address preemption in a case where that issue could not possibly affect the judgment entered and affirmed by the courts below.

II. THE COURT OF APPEALS CORRECTLY RULED THAT PETITIONERS' CLAIMS OF STRICT LIABILITY, NEGLIGENCE, AND CONSPIRACY WERE TIME-BARRED

A. Dr. Kenamore's Affidavit Was Timely Filed

Petitioners' statement that the affidavit of Dr. Kenamore was not filed until the day before the hearing on April 12, 1994, is misleading. (Pet. 5). The affidavit in question was filed on April 11, 1994, and a hearing was held before Judge Hittner on April 12, 1994. (R. Vol. 24). However, there was no ruling, and

the case was transferred to Judge Gilmore. The motions for summary judgment were reargued before Magistrate Judge Milloy at a hearing on July 28, 1994, over three months after the affidavit was filed. (R. Vol. 25). During that three-month period Petitioners never attempted to depose Dr. Kenamore, and Petitioners never moved for a continuance pursuant to Federal Rule of Civil Procedure 56(f). Finally, at the July 28, 1994 hearing, Petitioners indicated to Judge Milloy that they were abandoning their objection to the filing of Dr. Kenamore's affidavit. (R. Vol. 25, p. 60).

B. The Court Of Appeals Correctly Held That Mere Allegations By Petitioners That Dr. Kenamore May Have Been Mistaken, Without Supporting Evidence, Were Insufficient To Defeat A Motion For Summary Judgment

Petitioners sought to create a fact issue by looking to Mr. Allgood's testimony from a prior, unrelated workers' compensation proceeding. The district court properly refused to consider this hearsay, ruling that Federal Rule of Civil Procedure 32 permits the use of testimony from another litigation only against parties who were "present or represented at the taking of the deposition or who had reasonable notice thereof." *See also* Fed. R. Evid. 804(b)(1).

Petitioners do not contend that respondents were present or represented at the workers' compensation deposition, nor do petitioners maintain that the workers' compensation testimony would be admissible at trial. Petitioners instead argue that the district court should have treated this hearsay testimony as an affidavit, and considered it in deciding respondents' motions for summary judgment. Federal courts have rejected this logic on many occasions. For example, in *Geiserman v. MacDonald*, 893 F.2d 787, 793 (5th Cir. 1990), the court explained:

> Material that is inadmissible will not be considered on a motion for summary judgment because it would not establish a genuine issue of material fact if offered at trial and continuing the action would be useless.

Id., *quoting* 10A Wright, Miller & Kane, *Federal Practice and Procedure*, § 2727 at 156 (1983 ed.)(internal quotation omitted); *see also Duplantis v. Shell Offshore, Inc.*, 948 F.2d 187, 192 (5th Cir. 1991); *FDIC v. Roldan Fonseca*, 795 F.2d 1102, 1110 (1st Cir. 1986).

Here, petitioners did not show that "continuing the action" would be anything but "useless" because they did not put forth any facts that could be put in an admissible form at trial. In the authorities that petitioners cite, inadmissible testimony in the form of affidavits or inadmissible deposition testimony was considered at the summary judgment stage only where the individual affiant or deponent was alive *and could testify* to the underlying facts at trial.[1] Petitioners here offered no such potentially admissible trial testimony. Admittedly, their only hope was to elicit helpful testimony at trial on cross-examination of Dr. Kenamore. This is not, of course, what Federal Rule of Civil Procedure 56 contemplates. "Summary judgment cannot be avoided where all that the responding party can hope for is to induce [the affiant] to discredit his affidavits on cross-examination during trial." *Peoples Mortgage Co. v. Federal Nat'l Mortgage Ass'n*, 856 F. Supp. 910, 936 (E.D. Pa. 1994), *quoting* 28 Fed. Proc., L.Ed.

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[1] For example, in *Hoover v. Switlik Parachute Co.*, 663 F.2d 964, 967 n.3 (9th Cir. 1981), the court considered hearsay deposition testimony where the deponents were "live witnesses available for testimony, whose testimony would be admissible at trial." *See also Tormo v. Yormark*, 398 F. Supp. 1159, 1169 (D.N.J. 1975) (considered inadmissible deposition testimony where at trial the facts could be offered "in the form of testimony of presently available witnesses"); *Napier v. Brown*, 492 N.E.2d 847, 851 (Ohio Ct. App. 1985) ("these authorities place heavy emphasis on the fact that on a motion for summary judgment, the statements are not offered in the form of prior deposition testimony but in the form of testimony of a *presently available witness*"). Moreover, petitioners' reliance on *United States v. Fox*, 211 F. Supp. 25, 30 (E.D. La. 1962), *aff'd*, 334 F.2d 449 (5th Cir. 1964), is particularly specious. In *Fox*, the court considered depositions that were taken in that case, not in a different case.

§ 62:564 (1984); *see also Modern Home Institute, Inc. v. Hartford Accident and Indemnity Co.*, 513 F.2d 102, 110 (2d Cir. 1975); *Prusinki v. Holland*, 228 F. Supp. 959, 961 (E.D. Wis. 1964).

In any event, even if the district court could somehow have considered the workers' compensation deposition testimony, no issue of fact would have been created for trial. Moreover, Mr. Allgood merely testified in that deposition that Dr. Kenamore had advised him to stop smoking, and had warned him about emphysema. Mr. Allgood was not asked — and did not testify — as to whether Dr. Kenamore actually told him that he had emphysema. In contrast, the medical records and Dr. Kenamore's affidavit both independently establish that Mr. Allgood was told that he had emphysema more than two years before he died.

C. The Court Of Appeals Correctly Held That The Texas Doctrine Of Continuing Tort Did Not Apply In This Case

The court of appeals correctly held that the doctrine of continuing tort did not apply to this case because Mr. Allgood discovered that he had been injured by the product. Under Texas law, the determinative factor regarding limitations is when one discovers or should have discovered that he has been injured by the product, not when one stops using the product. *Upjohn Co. v. Freeman*, 885 S.W.2d 538, 542 (Tex. Ct. App. 1994). The court of appeals correctly held that the casual relationship between smoking and Mr. Allgood's injuries was known to Mr. Allgood as early as February of 1986 and, therefore, the continuing tort doctrine was inapplicable. (Pet. App. 3a).

III. THE COURT OF APPEALS CORRECTLY AFFIRMED THE SUMMARY JUDGEMENT ON PETITIONERS' WARRANTY CLAIMS

A. The Court Of Appeals Correctly Held That TI And CTR Were Not Sellers

Under Texas law, a seller is a person who sells or contracts to sell goods. Tex. Bus. & Comm. Code Ann. § 2.103(a)(4) (Vernon 1994). Respondents The Tobacco Institute, Inc. ("TI") and The Council for Tobacco Research - U.S.A., Inc. ("CTR") submitted affidavits stating that they had never manufactured or sold cigarettes. (Pet. App. 5a). Petitioners provided no evidence that TI or CTR ever sold or manufactured cigarettes.

B. The Court Of Appeals Correctly Held That None Of The Statements Or Advertisements Relied On By Petitioners Explicitly Extend To Future Performance

The Texas Supreme Court has held that § 2.725 of the Texas Business and Commerce Code "clearly states" that a breach of warranty claim "accrues at the time of delivery, not at the time of discovery." *Safeway Stores, Inc. v. Certainteed Corp.*, 710 S.W.2d 544, 546 (Tex. 1986). The only exception to this rule occurs in breach of express warranty cases when a buyer and seller "freely negotiate to extend liability into the future." *Id.* at 546. For this exception to apply, however, the warranty must make specific reference to a specific date in the future. *Id.* at 548; *see also Bell v. Showa Denko K.K.*, 899 S.W.2d 749, 756 n.2 (Tex. Ct. App. 1995).[2] Here, there was no negotiation between Mr. Allgood and any of the respondents, nor did any of the respondents' alleged warranties refer to a "specific date in the future."

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[2] The statute of limitations in implied warranty claims always runs from the date of sale. The future performance exception does not apply to implied warranty claims. *See, e.g., Safeway Stores*, 710 S.W.2d at 547-48.

Petitioners do not dispute these points. Instead, petitioners argue that a broader future performance exception should apply to their warranty claims. According to petitioners, warranty claims should not be governed by § 2.725's accrual language whenever manufacturers make any representation about the future performance of their goods, even when such warranties do not refer to a "specific date in the future." Courts applying Texas law, have repeatedly rejected attempts to impose such a broader "future performance" standard and have consistently held that the exception only applies when the warranty at issue refers to a "specific date in the future." *See, e.g., Dallas Power & Light Co. v. Westinghouse Elec. Corp.*, 855 F.2d 203, 207 (5th Cir. 1988); *American Alloy Steel, Inc. v. Armco, Inc.*, 777 S.W.2d 173, 176 (Tex. Ct. App. 1989).

IV. THE COURT OF APPEALS CORRECTLY HELD THAT PETITIONERS' FRAUD CLAIM FAILED FOR LACK OF RELIANCE

Reliance is an essential element to all claims for fraud under Texas law, including claims based upon alleged fraudulent omissions. *Trenholm*, 646 S.W.2d at 930, 932; *Crawford Painting & Drywall Co. v. J. W. Bateson Co.*, 857 F.2d 981, 985 (5th Cir. 1988), *cert. denied*, 488 U.S. 1035 (1989).

Petitioners presented no summary judgment evidence indicating that Mr. Allgood smoked cigarettes in reliance on any alleged misrepresentation in the 1954 newspaper advertisement entitled "A Frank Statement To Cigarette Smokers." Petitioners presented no summary judgment evidence indicating that Mr. Allgood smoked cigarettes in reliance upon alleged misrepresentations in any of respondents' other advertisements. Both lower courts found that the summary judgment record negated petitioners' assertion that Mr. Allgood relied on advertising in choosing to smoke. (Pet. App. 6a-7a). Moreover, both courts noted that Petitioners' own expert witness, Dr. Grabowski, conceded that even if Respondents had placed explicit warnings on packages of cigarettes as early as 1942, Mr. Allgood would still have smoked. (*Id.*).

Given their complete failure to put forth even a shred of evidence on the element of reliance — not to mention a record which actually negates their claim — petitioners seek to change Texas law to permit them to raise their fraud claim on the ground that Mr. Allgood "had access to [respondents'] publications" and "probably read them." (Pet. 26). No case applying Texas law has ever adopted such a loose standard for the element of reliance. *See, e.g., Steiner v. Southmark Corp.*, 734 F. Supp. 269, 279 (N.D. Tex. 1990) (observing that no Texas precedent permits presumption of reliance for common law fraud claim). Moreover, no federal court has ever permitted a fraud claim to go to a jury based on such a mere conjecture, especially where the summary judgment evidence established that the plaintiff knew of the allegedly undisclosed facts. *See, e.g., Quest Exploration and Dev. Co. v. Transco Energy Co.*, 24 F.3d 738, 742 (5th Cir. 1994); *Haralson v. E.F. Hutton Group, Inc.*, 919 F.2d 1014, 1025-30 (5th Cir. 1991).

V. THE COURT OF APPEALS PROPERLY RULED THAT PETITIONERS' CLAIMS FAILED PURSUANT TO TEXAS' COMMON KNOWLEDGE DOCTRINE

As an alternative ground for granting respondents' motions for summary judgment, the court of appeals and the district court ruled that petitioners could not maintain their claims because Texas law does not permit product liability suits based on inherent risks that are "common knowledge." Pet. App. 7a-8a; (R. 5504-5501, 5753-5752). In *McGuire*, the Texas Supreme Court rejected claims for strict liability, fraud, negligence, breach of warranty and conspiracy — the identical causes of action raised in this lawsuit — against manufacturers of alcoholic beverages and related trade organizations. *McGuire*, 814 S.W.2d 385. The court of appeals correctly held that, like the dangers of alcohol consumption, the dangers of cigarette smoking have long been known to the community. *See, e.g., Roysdon v. R. J. Reynolds Tobacco Co.*, 849 F.2d 230, 236 (6th Cir. 1988); *Paugh v. R. J. Reynolds Tobacco Co.*, 834 F. Supp. 228, 230-31 (N.D. Ohio 1993).

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

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September 13, 1996

Supreme Court, U.S.
FILED
SEP 23 1996
CLERK

No. 96-248

In The

Supreme Court of the United States

October Term, 1995

MRS. SAMUEL E. ALLGOOD, INDIVIDUALLY AND AS INDEPENDENT EXECUTRIX OF THE ESTATE OF SAMUEL E. ALLGOOD, MARCUS ALLGOOD and MALCOLM ALLGOOD,

Petitioners,

vs.

R.J. REYNOLDS TOBACCO COMPANY, THE AMERICAN TOBACCO COMPANY, THE TOBACCO INSTITUTE, INC. and THE COUNCIL FOR TOBACCO RESEARCH-U.S.A., INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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I. Reply to "Statement of the Case."

Sam Allgood's February 20, 1986 Amoco medical record also states "Chest - no significant abnormality (includes to percussion and auscultation)," so any emphysema was incipient, and the Amoco medical records themselves raise a genuine issue of fact whether Dr. Kenamore ever told Sam Allgood he had emphysema caused by his smoking. Petition for Certiorari, pages 8-9.

II. Reply to "Reasons for Denying the Writ."

The Petition for Certiorari, "Reasons for Granting the Petition," pp. 4-5, summarizes, and the "Argument," pp. 5-30, sets forth, many important federal questions raised by the Fifth Circuit Court of Appeals' Opinion. "Reasons for Granting the Petition" also satisfies the considerations set out in Rules of the Supreme Court 10(a), (c). These questions all arise under F.R.Civ.P. 56, and are all questions of law. Respondents' two cases, *Graver Tank & Mfg. Co.* and *Goodman*, involve proposed review by this Court of fact findings, not conclusions of law, and are inapposite.

III. Reply to "This Case Presents No Serious Preemption Question."

Regarding the second paragraph, the cases cited there, *Cantley*, *Sonnenreich*, and *Griesenbeck*, all involve failure to disclose claims: respectively at the pages cited, "Cantley's fraudulent suppression claim merely alleged generally that the defendants had failed to inform Godfrey of the risks of smoking," "Defendants urge the Court to dismiss those portions of the Complaint alleging that Defendants negligently failed to warn ... ," and "Plaintiff's theory of the case asserts that defendant should have warned her mother somehow... ." Petitioners' fraudulent concealment claim (R. 2054) makes no allegation of failure to disclose or channel for disclosure:

> B. Fraud (Intentional Concealment): while knowing that cigarette smoking was addictive and caused

> disease and death, or at least while knowing that there was credible evidence, as pled in paragraph 5 above, that cigarette smoking was addictive and caused disease and death, and knowing that the public lacked such knowledge and was unable to discover it, concealing such knowledge from the public, including Sam Allgood, including as pled in paragraph 6 above, with the intention of causing them to begin and continue to smoke cigarettes in such ignorance, which Sam Allgood did.

Nor does Texas law on fraudulent concealment require an allegation of failure to disclose or channel for disclosure. *New Process Steel Corp. v. Steel Corp. of Texas*, 703 S.W.2d 209, 214 (Tex. App.--Houston [1st Dist.] 1985, writ ref'd n.r.e.) (approved jury charge). *New Process Steel* is the basis for the State Bar of Texas PJC [Pattern Jury Charge] 105.03:

> Fraud occurs when[:] a. a party conceals *or* fails to disclose a material fact within the knowledge of that party, b. the party knows that the other party is ignorant of the fact and does not have an equal opportunity to discover the truth, c. the party intends to induce the other party to take some action by concealing *or* failing to disclose the fact, and d. the other party suffers injury as a result of acting without knowledge of the undisclosed fact. (emphasis supplied)

Respondents' argument here misses the point entirely.

Regarding the third paragraph, Petitioners had only to show genuine issues of material fact, not "sufficient evidence to support a finding... ."

Respondents' other arguments are adequately addressed in the Petition for Certiorari.

IV. Reply to "II. The Court of Appeals Correctly Ruled That Petitioners' Claims of Strict Liability, Negligence, and Conspiracy Were Time-Barred. A. Dr. Kenamore's Affidavit Was Timely Filed"

Petitioners' counsel received AT's and RJR's reply containing Dr. Kenamore's affidavit, a "50-100 page document ... at 4:50 p.m." on April 11, 1994. (R.5123.) The Docket entry for the April 12, 1994 hearing included this: "4/12/94 ... terminated deadlines, Pltf to file summary not exceed 20 pg's by 4/22/94 at noon ... ." (Dkt. p. 25.) Petitioners were allowed at the April 12, 1994 hearing only to answer Judge Hittner's questions (R. Vol. 24, pp. 4, 23-24, 26, 28, 33-35). Petitioners timely objected to this untimely filing, on the 1st and 14th pages of their timely-filed Summary. (R. 5154, 5139.) The July 28, 1994 hearing before the Magistrate Judge wasn't noticed until July 22, 1994 (not ten days, F.R.Civ.P. 56(c)) (Dkt. p. 25), and the 7/28/94 Minute Entry also stated, "terminated deadlines." (Dkt. p. 27.) Respondents' suggestion that Petitioners might have sought to depose Dr. Kenamore further presumes that Petitioners had any reason to do so when Dr. Kenamore's affidavit was not part of the summary judgment evidence.

Respondents' statement that Petitioners "indicated to Judge Milloy that they were abandoning their objection ..." is wrong. At that hearing Petitioners' counsel had just asserted the untimely filed objection and then said (R. Vol. 25, p. 60):

> Secondly, Your Honor, - - I must say, though, I don't know if that's been cured by we now having had another hearing. I'm not sure of that, so I don't lean on that too strongly. Okay?

Petitioners' counsel did not "abandon" the objection, rather he still relied on it, only "not too strongly." Respondents' statement acknowledges that Petitioners had made the objection, and Petitioners' counsel didn't withdraw their objection made earlier in their Summary. (R. 5154, 5139.)

V. Reply to "II. B. The Court of Appeals Correctly Held That Mere Allegations By Petitioners That Dr. Kenamore May Have Been Mistaken, Without Supporting Evidence, Were Insufficient To Defeat A Motion For Summary Judgment."

Regarding the *Geiserman*, *Duplantis*, and *Roldan Fonseca* cases, these authorities speak of "inadmissible" in terms of violating a substantive evidence rule, such as hearsay or lack of personal knowledge. *Geiserman*, 893 F.2d at 792, states: "First, we uphold the court's exclusion of the affidavit of the proposed expert witness, in order to enforce its discovery order and local rule," and quotes from 10A Wright & Miller, *Federal Practice and Procedure*, §2727, at 156: "Material that is inadmissible ...," which is preceded by:

> Further, Rule 56(e) requires the adversary to set forth facts that would be admissible in evidence at trial.[35]

Footnote 35, after discussing a case rejecting "conclusory statements and statements not made on personal knowledge," points to "the requirement of admissibility set out in §2738," which, at p. 470, states as to summary motion affidavits:

> ... the first question to be addressed is whether the information they contain (as opposed to the affidavits themselves) would be admissible at trial. (n. deleted.)

Duplantis, 948 F.2d at 192, held only that as summary judgment evidence, besides being unsworn, the Robert letter "gives no indication that Robert is qualified to render opinions on such matters." *Roldan Fonseca*, 795 F.2d at 1110, only rejected certain receipt photocopies because they were hearsay, no custodian statement was offered, and there was no statement on personal knowledge that they evidenced payment on the note.

Regarding the third paragraph, Respondents did not dispute the Petition for Certiorari, at pp. 6-7, showing that in this Court's decision in *Celotex*, the non-movant's decedent's

ex parte deposition was accepted as summary judgment evidence, even though the decedent could not appear at trial. All of Respondents cases on this point are pre-*Celotex*, except *Peoples Mortgage*, which did not involve any opposing deposition. Also, in the *Peoples Mortgage*, *Modern Home Institute*, and *Prusinki* cases, the party attempting to raise a genuine issue with an opposing affidavit or other summary judgment evidence, had no summary judgment evidence whatsoever to counter with, and only argued speculatively as to what they could do on cross at trial. Allgood's deposition isn't offered in a vacuum, since the Petition for Certiorari, at pages 8-9, shows that Dr. Kenamore's affidavit testimony, should he appear at trial and repeat it, will be effectively contradicted by his own records. *Hoover* and *Tormo* so stated only to distinguish *Taylor*, which was unnecessary since in *Taylor* the court had barred the ex parte deposition under the predecessor to F.R.Civ.P. 32(a), and *Hoover* and *Tormo* had already rejected the Rule 32(a) argument and accepted the ex parte depositions as affidavits.

Respondents' other arguments are adequately addressed in the Petition for Certiorari.

VI. Reply to Respondents' Sections III, IV and V.

At Brief in Opposition, p. 8, *Dallas Power and Light* and *American Alloy Steel* are commercial cases. At page 9, top paragraph, Respondents ignore the summary judgment evidence of reliance, once access is shown, at Petition for Certiorari, pp. 21-25 (Knox, Brumfield, Grabowski, Crainer, *Vasquez* progeny, *Beck*).

Respondents' other arguments in these Sections are adequately addressed in the Petition for Certiorari.

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